**Be-Lo Stores *and* United Food and Commercial Workers Union, Local 400, AFL–CIO, CLC.** Cases 11–CA–14586 (formerly 5–CA–21583), 11–CA–14775–1 (formerly 5–CA–21852), 11–CA–14775–2 (formerly 5–CA–21880), 11–CA–14775–3 (formerly 5–CA–21975), 11–CA–14775–4 (formerly 5–CA–22015), 11–CA–14775–5 (formerly 5–CA–22015), 11–CA–14775–6 (formerly 5–CA–22078), 11–CA–14775–7 (formerly 5–CA–22082), 11–CA–14775–8 (formerly 5–CA–22106), 11–CA–14775–9 (formerly 5–CA–22344), 11–CA–14712 (formerly 5–CA–22344), 11–CA–14793–1–2–3–4–5 (formerly 5–CA–22430–1–2–3–4–5), 11–CA–14811 (formerly 5–CA–22449), 11–CA–14775–10 (formerly 5–CA–22185), 11–RC–5823 (formerly 5–RC–13449)

July 31, 1995

## DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On September 15, 1993, Administrative Law Judge Martin J. Linsky issued the attached decision. The Respondent, the Charging Party, and the General Counsel filed exceptions with supporting briefs and answering briefs. Thereafter, the Respondent and the Charging Party filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] only to the extent consistent with this Decision and Order.[3]

The issues presented for further discussion here are: (1) whether the Respondent, through its election materials, violated Section 8(a)(1) by threatening employees during the election campaign with store closure and job loss if the Union won the election; (2) whether the Respondent violated Section 8(a)(3) by discharging numerous employees because of their support for the Union; (3) whether the Respondent violated Section 8(a)(1) by denying union picketers access to the sidewalks and parking lots at certain of its stores and by maintaining state court actions seeking to enjoin the Union's peaceful picketing on its property after the Board had issued complaints alleging that the Respondent's denial of access to the Union was unlawful; and (4) whether a bargaining order is warranted in the circumstances present here.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We also find no merit in the Respondent's allegations of bias and prejudice on the part of the judge. Thus, we perceive no evidence that the judge prejudged the case, made prejudicial rulings, or demonstrated bias against the Respondent in his analysis or discussion of the evidence. There is no basis for finding that bias and prejudice exist merely because the judge resolved important factual conflicts in favor of the General Counsel's and the Charging Party's witnesses. *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949).

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] Crediting the testimony of former employee Evelyn Keyes over that of Store 37 Comanager Perras, the judge found that shortly before the election Perras had questioned Keyes, a known union supporter, regarding what she thought about the Union and had told Keyes that if the Union came in stores might close, employees would lose their jobs, and hours would be reduced. The judge found these interrogations and threats violated Sec. 8(a)(1). The Respondent excepts on the ground, inter alia, that the judge failed to consider the testimony of former employee Evelyn Chappell, who was present during the incident at issue and whose testimony corroborated Perras' denial that she had unlawfully interrogated or threatened Keyes. The Respondent argues, in effect, that if the judge had considered Chappell's testimony he would have dismissed these 8(a)(1) allegations. We disagree.

Although the judge did not explicitly address the issue of Chappell's credibility in his analysis of these 8(a)(1) allegations, he specifically discredited Chappell's testimony that Union Organizer Rogers had told her that the purpose of signing a union authorization card was to get an election. Having discredited Chappell on this important issue, we infer that the judge discredited her testimony generally and therefore did not discuss her ''corroboration'' of Perras' testimony. Accordingly, we adopt the judge's finding, based on Keyes' credited testimony, that Perras unlawfully interrogated and threatened Keyes in violation of Sec. 8(a)(1).

[3] The General Counsel excepts, inter alia, to the judge's inadvertent failure to order that the Respondent make whole employees Lavonne Billups and Kelly Riddick for unlawfully reducing the former's hours and unlawfully suspending the latter for 1 day in April 1991. We find merit in these exceptions and shall modify the judge's recommended Order accordingly.

The General Counsel also excepts to the judge's ''inadvertent failure'' to order the Respondent to make whole employee Coleen Hitt ''consistent with his finding'' that the Respondent unlawfully suspended Hitt for 2 days in May 1991. Since the judge did not find this violation, we conclude that his failure to include the remedy requested by the General Counsel was not inadvertent. Accordingly, we find this exception without merit.

For the reasons set out below in sec. IV of our decision, we agree with the judge that a bargaining order to remedy the Respondent's misconduct is warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). We also conclude that the scope and severity of the Respondent's unlawful conduct ''evince a general disregard for the employees' fundamental statutory rights and warrant a broad cease-and-desist order.'' *Mayfield Produce Co.*, 290 NLRB 1083, 1089 (1988); *Hickmott Foods*, 242 NLRB 1357 (1979). We shall modify the judge's recommended Order accordingly.

For the reasons set out below, we find, contrary to the judge, that the Respondent, through certain of its election messages to employees, violated Section 8(a)(1) by threatening employees with store closure and job loss if the Union won the election. We adopt the judge's findings that the Respondent violated Section 8(a)(3) by unlawfully discharging numerous employees. We reverse, however, the judge's findings that the Respondent violated the Act by discharging employees Tom DeYarmon and Colleen Hitt, and we dismiss these 8(a)(3) allegations. Contrary to the judge, we also find that the Respondent violated Section 8(a)(1) by denying union picketers access to certain of its stores after the election. We adopt the judge's findings that the Respondent also violated Section 8(a)(1) by maintaining its state court actions after the General Counsel had issued complaints alleging that the Respondent's denial of access to the Union was unlawful. Finally, as explained below, we agree with the judge that a bargaining order is fully warranted in the circumstances present here.

In addition to the violations discussed below, the consolidated complaint alleges that, both before and after the election, the Respondent violated Section 8(a)(1) by, inter alia, threatening employees with store closure, interrogating employees, threatening employees with discharge, and threatening reduction in working hours and layoff. We adopt the judge's findings of these and other 8(a)(1) violations that occurred over many months at various stores.[4] Finally, we adopt the judge's finding that the Respondent violated Section 8(a)(5) by failing and refusing to bargain with the Union on and after March 20, 1991, when the Union represented a majority of the unit employees.

Before we discuss the four major issues presented here, we shall briefly set out the context in which these issues arise. In the spring of 1990, the Union began organizing the Respondent's employees at four of its retail grocery stores. After a representation hearing, the parties stipulated that the appropriate unit consisted of the employees at 30 stores in the Tidewater area of Virginia.[5] After it had collected authorization cards from a majority of unit employees, the Union requested that the Respondent engage in bargaining. The Respondent denied the request. An election was held on March 21, 1991.[6] The Union lost the election.[7] On April 10, the Union began picketing at certain of the Respondent's stores to protest the Respondent's alleged unfair labor practices. The Union picketed at 16 of the Respondent's stores between April 10 and the end of July. The Respondent enforced its no-solicitation policy to deny the picketers access to store property and sought and obtained injunctive relief in five different Virginia jurisdictions beween April and August. On September 12, the General Counsel issued a complaint alleging that the Respondent unlawfully denied the Union access to its property and requesting an order that the Respondent be required to apply to each of the state courts for dissolution of the respective injunctions. On December 9, the Respondent moved to stay the injunctions. We now turn to the discussion of the issues outlined above.

## I. THE ELECTION CAMPAIGN

The General Counsel excepts to the judge's finding that the Respondent, through its election materials, did not unlawfully threaten employees with plant closure and job loss if the Union won the election. For the reasons set out below, we find merit in these exceptions and find that such violations occurred during the election campaign. As these violations are parallel to objections to the election filed by the Union in Case 11–RC–5823 (formerly Case 5–RC–13449) that was consolidated by the Regional Director with the unfair labor practice cases set for hearing by the judge here, we find merit in the objections and order that the election held March 21, 1991, be set aside.[8] We shall not direct that a second election be held, however, because we find ''that the employees' representational desires expressed here through authorization cards would, on balance, be better protected by a bargaining order than

[4] The 8(a)(1) violations found by the judge are more fully set out in sec. IV, infra.

[5] Twenty of these stores are owned by Bonnie Be-Lo Markets (the corporate stores). Of the remaining 10 stores, J. L. Saunders owns 3, Harrell and Harrell own 4, and L. C. Shelton, Raul, Inc. (the Frank Fentress store) and Pegelin, Inc., each own 1.

The bargaining unit (as set out in the complaint) consists of:

> All regularly scheduled full-time and part-time employees, including store-level produce department supervisors employed by Bonnie Be-Lo Markets, Inc., Harrell and Harrell, Inc., J.L. Saunders, Inc., L.C. Shelton, Inc., and Raul, Inc., doing business as Be-Lo Stores located in Tidewater, Virginia, metropolitan area, excluding store managers, store-level co-managers, store-level meat department supervisors, guards and supervisors as defined in the Act.

[6] All dates are in 1991 unless otherwise indicated.

[7] The result of the election was 220 for the Petitioner, 377 against, with 103 nondeterminative challenged ballots, and 2 void ballots. There were approximately 789 eligible voters.

[8] The Union filed additional objections that are also parallel to other allegations of the consolidated complaint. Thus, in its objections to the election, the Union contended that the Respondent engaged in objectionable conduct and thereby interfered with employee free choice in the election by, inter alia, discharging union supporters to discourage union activity, unlawfully interrogating employees regarding their union sympathies, threatening employees with layoffs if the Union won the election, threatening employees with loss of pay and benefits if the Union were successful, and disciplining and coercing employees because of their support for the Union. As explained in sec. IV, below, we have adopted the judge's findings of violations that are coextensive with these objections. These unfair labor practices that occurred during the critical period provide further support for the judge's implicit finding that the March 21 election should be set aside.

by traditional remedies.'' *Eddyleon Chocolate Co.*, 301 NLRB 887, 892 (1991).

Although the judge found ''that the thrust of Respondent's message was to equate unionization of food stores in the Tidewater area with the subsequent closure of those stores and to raise an inference in the minds of its employees that if they selected the Union as their collective-bargaining representative they would see their store close and they would find themselves no longer working for Be-Lo,'' he nevertheless found that the Respondent's election messages were protected by Section 8(c) of the Act and were therefore not unlawful.[9] We agree with the judge that Store Owner Manual Saunders' June 7, 1990 letter to Be-Lo ''Associates'' and its ''script'' for supervisors contained no unlawful threats of reprisal and were therefore protected by Section 8(c). We reach a different result, however, with regard to the ''Pink Slip'' and accompanying letter which the Respondent sent to employees shortly before the election.[10]

As explained by the judge, shortly before the election the Respondent mailed to unit employees a ''Pink Slip'' which stated that ''you may want to take another look at what the UNITED FOOD AND COMMERCIAL WORKERS UNION got for their former dues payers in this area—A PINK SLIP.'' Attached was a letter, pink in color, purportedly on Big Star, Safeway, and Colonial stores' letterhead that read:

> Dear Unionized Employees.
>
> I regret to inform you that because we have lost our ability to compete in this extremely competitive market, we shall be forced to close this store and put you out of work.
>
> Sincerely,
>
> Colonial Stores/Big Star/Safeway

In determining whether the ''PINK SLIP'' and accompanying letter are unlawful, we are mindful of the Supreme Court's statement in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–619 (1969), that:

> § 8(c) [of the Act] merely implements the First Amendment by requiring that the expression of ''any views, argument, or opinion,'' shall not be ''evidence of an unfair labor practice,'' so long as such expression contains ''no threat of reprisal or force or promise of benefit'' . . . . Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ''threat of reprisal or force or promise of benefit.''

The issue here is whether the ''PINK SLIP'' and accompanying letter lost the protection of Section 8(c) because they contained threats that jobs would be lost and stores closed if the Union won the election. As noted above, we find that these two communications did contain such threats and were therefore unlawful. In reaching this conclusion, we emphasize that, unlike Manual Saunders' letter to ''Associates'' and the ''script'' for supervisors which we have found lawful, the letter to employees does not ask the employees to evaluate what the Union can do for them either in view of the purported decline of unions nationally or in light of what had happened at other recently unionized stores in the area, but simply tells employees that the Union got ''their former dues payers in this area—'A PINK SLIP.''' The Respondent thereby raised the strong possibility of store closure and job loss and then emphasized the immediacy of such a possible result by attaching the ''PINK SLIP'' that began ''Dear Unionized Employees'' and went on to inform recipients that ''we shall be forced to close this store and put you out of work'' because of inability to compete. Although the ''PINK SLIP'' purports to be from Colonial Stores, Big Star, and Safeway, the employees knew that the Respondent sent the letter and ''PINK SLIP.'' From this, they could reasonably conclude that if they voted in the Union, they would be the ''Unionized Employees'' addressed in the ''PINK SLIP'' who would suffer store closure and job loss. Especially in the circumstances here, where the judge found that on numerous occasions the Respondent directly threatened employees with job loss and store closure if the Union won the election, we conclude that the Respondent's election message to the employees threatened that they would get a ''PINK SLIP'' if they voted in the Union and became ''Unionized Employees.'' Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) by conveying the message to employees during the election campaign that stores would close and jobs would be lost if the Union won the election.

## II. THE ALLEGED 8(A)(3) DISCHARGES[11]

### 1. Tom DeYarmon

DeYarmon was the meat manager at Store 37 and an 11-year employee who had never been disciplined

[9] Sec. 8(c) states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

[10] Because we find that the pink slip and accompanying letter were unlawful, we find it unnecessary to decide whether Respondent President Corwin's dinner speech to employees and his videotaped speech contained threats of plant closure and job loss.

[11] We adopt the judge's findings that the Respondent violated Sec. 8(a)(3) by unlawfully discharging employees Lavonne Billups, An-

*Continued*

prior to March 1991. DeYarmon originally thought that he was included in the bargaining unit and was strongly in favor of the Union at that time. In January 1991, however, meat managers were found to be statutory supervisors and therefore excluded from the unit. James Harrell, the president of Harrell and Harrell, told DeYarmon that he was not allowed to vote and was to be on Be-Lo's team.

On Monday, March 4, a meat delivery day, DeYarmon had to fill the meat case with lunch meats and cut meat. Because one meatcutter reported late for work, DeYarmon began to fill up the meat case with lunch meats while another meatcutter cut meats. At some point, Store Manager L. J. Davis asked DeYarmon why he was not cutting meat. DeYarmon replied that one of the meatcutters was late and that all the work would get done. Later in the day, DeYarmon asked Davis how the meat area looked and Davis replied that everything looked the way it should. The following day was DeYarmon's day off. When DeYarmon returned to work on March 6, Davis gave him a termination notice which stated that DeYarmon was fired for filling the lunch meat case rather than cutting meat. When DeYarmon asked for an explanation, Davis said that he could not talk about it.

Finding that DeYarmon was openly prounion, and given the Respondent's antiunion posture and the ''absurd reason'' advanced for DeYarmon's discharge, the judge found that the Respondent violated Section 8(a)(3) by unlawfully discharging DeYarmon. We disagree.

As the judge himself stated, DeYarmon, as a statutory supervisor, ''could be lawfully discharged because he supported the Union but could *not* be lawfully discharged because he failed to unlawfully prevent union activity among employees or because he refused to violate the Act in his dealings with employees.'' (Emphasis in original.) Since the judge specifically found that James Harrell, president of Harrell and Harrell, did not instruct DeYarmon to engage in unlawful conduct as part of the Respondent's effort to prevent meat department employees from voting for the Union, DeYarmon's discharge cannot reasonably be attributed to his failure to engage in such unlawful conduct. Although the Respondent may have terminated DeYarmon because he was prounion, as the judge pointed out, such a discharge would not be unlawful. Accordingly, we reverse the judge and find that the Respondent did not violate the Act when it discharged DeYarmon on March 6, 1991.

2. Jamie Wischmann Cottrell

We agree with the judge that the Respondent violated Section 8(a)(3) by constructively discharging Cottrell, a meatwrapper at Store 102, on April 6, 1991. As the judge explained, shortly after Cottrell spoke with a union organizer in January 1991, Rodriquez, the comanager of the store, told Cottrell that he had seen her with the union organizer. The judge found that this statement unlawfully conveyed to Cottrell the impression that her union activity was under surveillance and that management was monitoring her union activity.

In February, Cottrell went on emergency sick leave. When she returned to the store prior to the election, Store Manager Weithers threatened that if the Union won the election the Respondent would close and everyone would lose their jobs. He added that it would be better for Cottrell if she voted ''no.'' Cottrell's immediate boss, Meat Manager Powers, also spoke with Cottrell prior to the election and repeated the threat that if the Union got in stores would close and employees would lose their jobs. On March 10, the Union circulated a flyer that contained a photograph of Cottrell and told her story. As the judge noted, ''[i]t was a powerful piece of union propaganda'' that recounted Cottrell's plight, including her lack of a guaranteed job when she recovered from surgery and her financial difficulties arising from her inability to pay the Respondent's health insurance premiums, and strongly urged employees to vote for the Union. When Cottrell made a tour of certain stores with union officials shortly before the election, she was treated poorly at two of the stores (Stores 46 and 47) and threatened with arrest if she did not leave. Cottrell served as a union observer at the March 21 election.

On April 6, Cottrell returned to Store 102 with a doctor's release. District Manager Hill, who was at the store when Cottrell returned, was angry that Cottrell wanted to return to work after the Union had lost the election and told her that she had been wrong. Hill also told Cottrell that he could not fire her, but that he would put her into Store 67, an antiunion store. Hill added that ''he would be on her like [a] fly on shit,'' that he would watch her every move, and would get rid of her at the first opportunity. Cottrell never reported to Store 67.

To establish a constructive discharge, the General Counsel must show that:

> First, the burdens imposed upon the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign. Second, it must be

gela Cox, Michael Salazar, Kim Howell, and Sabrina Frazier. We note that the Respondent does not except to the judge's findings that it unlawfully discharged Billups, Cox, and Howell. In his discussion of Salazar's unlawful discharge, the judge states incorrectly that Store Manager Davis' unlawful interrogation of Salazar occurred in ''July 1991.'' The incident in fact took place in mid-February 1991. Correction of this inadvertent error does not require a change in the result.

> shown that those burdens were imposed because of the employee's union activities.[12]

We are satisfied that these criteria are met here. As to the first requirement, on April 6, the Respondent, through Hill, imposed ''a change in [Cottrell's] working conditions so difficult or unpleasant as to force [Cottrell] to resign.'' Hill told Cottrell that he was going to transfer her to an ''antiunion'' store.[13] Because of the circulation of the March 10 flyer, Cottrell was well known as a very prounion employee and had already been treated poorly and threatened with arrest at two stores. When Hill told her that he was going to put her in an antiunion store, Cottrell could only believe that she would meet with hostility at that store as well. When Hill added that he would watch her every move and would get rid of her at the first opportunity, she could only conclude that it would be futile for her to report for work to Store 67 as Hill would find a reason to fire her at the first opportunity. Thus, Hill, by changing Cottrell's working conditions by assigning her to an ''antiunion'' store and by subjecting her to heightened scrutiny with the avowed intent of firing her, intended to, and in fact did, cause Cottrell to quit her employment with the Respondent. As to the second requirement, it is clear from Hill's statements to Cottrell to the effect that she had been ''wrong'' about the Union and that he was going to send her to an ''antiunion'' store, that Hill's actions against Cottrell were motivated by Cottrell's union activities. For these reasons, we agree with the judge that the Respondent constructively discharged Cottrell.

### 3. Shirley Terry

The judge found that the Respondent unlawfully discharged Terry, a 5-year employee who worked at Store 110 as a deli-bakery manager (a bargaining unit position), because of her union activity. According to the judge, the ''bottom line'' was that Terry was discharged because she gave away ''garbage'' and because she was ''tricked'' into admitting that she gave discounts on food to fellow employees. We agree with the judge that the Respondent unlawfully discharged Terry, but only for the reasons explained below.

Terry was a very prounion employee whose prounion stance was well known to the Respondent through a union flyer distributed to employees in January 1991 that featured 14 employees, including Terry. After the election, Terry picketed for the Union in front of some of the Respondent's stores. The judge found, and we agree, that from the time that Terry's picture appeared in the January flyer, the Respondent began to harass her by subjecting her work area to heightened scrutiny, usually undertaken on days after Terry had been off when the chance of finding something wrong was increased. As a result, Terry received several writeups. On May 6, 1991, the Respondent discharged Terry for improperly discounting and giving away old food.

The events leading to Terry's discharge are fully set out by the judge. In brief, Terry gave employee Mark Gardner some scraps of food for his dog. Terry put the scraps, which she otherwise would have thrown away, into a deli tray and marked the tray no charge. In an unrelated incident, Gardner put some steaks aside for later purchase. When Gardner went to pay for the steaks, he took the deli tray with him. McClendon, the cashier on duty, improperly discounted the steaks for Gardner. The Respondent found out about the discounting and called in Barnette, the Respondent's chief of security. On May 6, several days after the purchase, Barnette came to Store 110 to conduct an investigation. From his interviews with McClendon and Gardner, Barnette learned that Terry had given scraps of food to Gardner that otherwise would have been thrown out. Barnette then interviewed Terry at length in his closed car. Barnette tape recorded the interview.[14] When asked by Barnette, Terry stated that she had given discounts in the past with the approval of the prior store manager. Barnette did not attempt to interview the prior store manager.

Although Terry subjected herself to discipline by giving away food on this occasion without permission, the issue here is whether the Respondent would have discharged her for giving away food scraps if she were not an active union supporter. In ''dual motive'' cases such as the present one, the Board applies the analysis set out in *Wright Line*:[15]

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that the protected conduct was a ''motivating factor'' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action

[12] *American Licorice Co.*, 299 NLRB 145, 148 (1990), quoting *Crystal Princeton Refining Co.*, 222 NLRB 1068, 1069 (1976).

[13] The Respondent excepts to the judge's finding that Store 67 was, in fact, an ''antiunion'' store and points out that a significant number of employees at that store signed union authorization cards. We find this exception without merit. Contrary to the Respondent's assertion, the judge did not find that Store 67 was an antiunion store and whether, in fact, Store 67 was prounion or antiunion is not in issue. What is decisive is that the judge credited Cottrell's testimony that Hill told Cottrell that he was going to send her to an ''antiunion store'' and Cottrell reasonably relied on this statement in reaching her decision not to report to work at that store.

[14] The Respondent excepts to the judge's finding that Barnette did not tape record his interviews with Gardner and McClendon. We find merit in this exception, as included in the General Counsel exhibits are the tapes of all three interviews. The record does not indicate whether Barnette interviewed Gardner and McClendon in his closed car.

[15] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

would have taken place even in the absence of the protected conduct.

In finding that the General Counsel established a prima facie case that the Respondent discharged Terry because of her support for the Union, we emphasize that Terry was not a party to the discounting at issue here and that her sole involvement in the May incident was that she gave Gardner food scraps that otherwise would have been thrown away. Barnette, however, expanded his interrogation of Terry to include prior discounting, an issue unrelated to the conduct for which she had subjected herself to discipline. Having coaxed an admission that Terry had discounted in the past, Barnette declined to investigate Terry's claim that she had previously discounted food with the approval of the prior manager, a claim which, if true, would have exonerated Terry from the charge of discounting food without permission. Instead, Barnette immediately recommended Terry's discipline, including possible discharge. Given the Respondent's repeated harassment of Terry after it found out that she was a union supporter, we find that the General Counsel has established a prima facie case that the Respondent seized on Terry's conduct in giving away food scraps to discharge her.

In rebuttal, the Respondent argues that its treatment of Terry was not discriminatory because she received the same discipline as the other two employees in the ''ring,'' Gardner and McClendon, neither of whom was a union supporter. In finding this argument without merit, we emphasize that there was no ''ring,'' that Terry was not a party to the discounting for which Gardner and McClendon were discharged, and yet she received the same discipline as those employees for simply giving away food scraps. Given the Respondent's past harassment of Terry, we agree with the judge that the Respondent was out to get Terry because of her support for the Union and seized upon this opportunity to terminate her. It violated Section 8(a)(3) by doing so.

### 4. Coleen Hitt

The judge found that the Respondent violated Section 8(a)(3) by unlawfully discharging Hitt, a cashier at Store 122, on October 19, 1991. The judge found that although the Respondent was ''permitted'' to terminate Hitt under its overage/underage policy,[16] such a result was not ''mandated'' under that policy for the number of overages and underages that Hitt had on her record. Observing that the Respondent could have fired Hitt in May because of her violation of the Respondent's overage/underage policy, but refused to do so, and that Manual Saunders, the owner of three privately owned Be-Lo Stores and a member of Be-Lo's board of directors, testified that ''management could decide to retain an employee regardless of what they had done,'' the judge concluded that the Respondent fired Hitt because of her union activities. We disagree.

As explained above, in ''dual motive'' cases such as the present one, the Board applies a *Wright Line* analysis. Initially, we find that the General Counsel has established a prima facie case that the Respondent discharged Hitt because of her union activity. In this regard, we note that Hitt was an active union supporter who was featured in the January flyer along with Terry and 12 other employees. Hitt also served as an election observer for the Union and walked the picket line after the election. Hitt's union activities were well known to the Respondent. Further, as the judge pointed out, the Respondent only began to discipline Hitt after she became involved in the Union. In this regard, Mainello, the manager at Store 122, sent her home 2 days in May because she refused to take off her union jacket.[17]

In rebuttal, the Respondent asserts, in effect, that by using the Respondent's May refusal to discharge Hitt for her violation of the overage/underage policy against it, the judge is punishing the Respondent for being lenient by not firing Hitt in May when it was within its rights to do so.

We agree with the Respondent that its refusal to terminate Hitt either in May or after her next discrepancy on October 16 may be construed as evidence that the Respondent was willing to retain Hitt despite her prominent appearance as a supporter of the Union in the January campaign flyer and as the Union's election observer. Thus, it was only after the second disparity, that of October 17, that the Respondent terminated Hitt. In these circumstances, where the Respondent was ''permitted'' under its overage/underage policy to terminate Hitt in May or again after the disparity of October 16, we find that when the Respondent finally did terminate Hitt on October 17 that it was not without cause. Further, as Maniello testified without contradiction, in the past 2 years he had fired several cashiers at Store 122 for overage/underage infractions. Thus, it does not appear that the Respondent treated Hitt differently from other cashiers at Store 122 in the application of its overage/underage policy; and her union activity has little apparent link to the discharge, since the Respondent had treated her leniently in May and for the first October discrepancy, despite her prior prominence as a union activist. We are unwilling to conclude that the Respondent was required to give her special treatment not accorded other employees and

[16] ''Overs or unders'' denote a disparity between the amount that should be in a cashier's till at the end of a shift and the amount that is actually there. The Respondent had a progressive disciplinary system for overage/underage infractions.

[17] The judge found, and we agree, that the Respondent's disparate enforcement of its dress code violated Sec. 8(a)(1). See fn. 19 below.

continue to overlook her errors simply because she had engaged in union activity. Accordingly, we find that the Respondent has rebutted the General Counsel's prima facie case and dismiss this allegation of the complaint.[18]

### 5. Kelly Call

Kelly Call was a produce clerk at Store 148. As the judge observed, she was a ''very pro-union'' employee who wore union buttons and insignia to work and served as a union observer at the March 21 election. Prior to the election, Call was the object of numerous interrogations and threats which the judge found were violative of Section 8(a)(1). After the election, Call continued to work at Store 148, while serving as a picket outside the store on her own time.

Prior to her picketing, Flannery, the produce merchandiser at Store 148, had approved of Call's produce rack. After Call began picketing, however, Flannery would tear apart her produce rack looking for problems. Call received a written warning from Flannery about her work after she began picketing and subsequently received another written warning from Ames, the store manager. The judge credited Call's testimony that her produce rack was the same both before and after she began picketing. We adopt his finding that these written warnings violated Section 8(a)(3) because they were issued in retaliation for Call's protected concerted activity in engaging in picketing.

For the following reasons, we also agree with the judge that Call's May discharge was unlawful. Call wore a union T-shirt to work on May 13. District Manager Winfrey told her to change the T-shirt or go home. When Call refused, Winfrey told her that she was ''expelled'' from the job. Call left the store. When she later returned to get documentation regarding her ''expulsion,'' Store Comanager Hodges told Call that she had to change clothes or leave. When Call asked Hodges how many times you could be expelled before you were fired, Hodges did not answer. When Call returned to work the next day, Ames told her that she was considered a voluntary quit.

In deciding whether the Respondent unlawfully discharged Call, we find that the Respondent disparately enforced its dress code against Call in May. In so finding, we rely on Call's credited testimony that prior to her discharge she had regularly worn T-shirts with writing on them to work and had never been told that she could not wear such T-shirts or T-shirts in general. Accordingly, we find that the Respondent ''expelled'' Call because of her support for the Union and agree with the judge that the Respondent violated Section 8(a)(3) by discharging Call on May 14, 1991.[19]

### 6. Erwin Hatchett

Hatchett was a prounion employee who was working as a meatcutter at Store 232 at the time of his involuntary layoff in January.[20] The judge inferred from the Respondent's grant of a merit pay raise to Hatchett in December 1990 that the Respondent considered Hatchett to be a competent employee. Despite the fact that Hatchett was eligible for recall, as of the date of the hearing in this case, the Respondent had not recalled him. Finding that the Respondent knew of Hatchett's protected concerted activity on the picket line as of early April, the judge concluded that the Respondent's failure to recall Hatchett from mid-April on was a violation of Section 8(a)(3). The Respondent excepts on the ground that since there were no openings in the meat departments at any of the stores to which Hatchett could have been recalled, its failure to recall Hatchett could not have been related to his union activities. We find this exception without merit.

As explained above in our *Wright Line* discussion, in ''dual motive'' cases the General Counsel must

[18] Contrary to his colleagues, Member Truesdale agrees with the judge that the Respondent unlawfully discharged Hitt because of her union activity. In this regard, Member Truesdale would emphasize that the Respondent only began to discipline Hitt after it learned of her union activity and that Hitt reported only two overage/underages in the 5-month period following the May disparity. Given the Respondent's other 8(a)(3) violations and its tactic of weeding out union supporters under the guise of discipline, Member Truesdale would find that the Respondent has not rebutted the General Counsel's prima facie case and would find this violation.

[19] In his analysis of the dress code regarding T-shirts at Store 148, the judge also examined the Respondent's general policy as to T-shirts and found that the policy was ''unclear'' because the employee handbook in force at the time of the union campaign did not mention T-shirts. The judge then turned to an examination of the record evidence. Although the 5th sentence of the 11th paragraph of Part II,14, of the judge's decision is incomplete, we find from our own examination of the record evidence that the Respondent first began telling employees not to wear T-shirts or to cover T-shirts with smocks after the union campaign began and that prior to that time the wearing of T-shirts was not prohibited. In reaching this conclusion, we rely not only on the absence of any documentary evidence that the Respondent had a no T-shirt policy prior to the union campaign, but also on the judge's finding that the Respondent violated Sec. 8(a)(1) by disparately enforcing its no-T-shirt rule against Darlina Bynum, an employee at Store 236. According to Bynum's credited testimony, the Respondent told her to cover up her union T-shirt with a smock in the fall of 1990, but never told her to cover up her Pepsi T-shirt. Finally, as set out above in our discussion of the Hitt discharge, the Respondent also disparately enforced a rule against the wearing of jackets at work, forbidding the wearing of union jackets after the Union came on the scene. Thus, the record establishes that the Respondent disparately enforced its dress code to prohibit the wearing of union jackets and T-shirts after the Union began its campaign to organize the Respondent's employees. As found by the judge, such disparate enforcement of the dress code is violative of Sec. 8(a)(1). See, e.g., *Wellstream Corp.*, 313 NLRB 698, 703–704 (1994).

[20] The layoff was occasioned by a downturn in the Respondent's business caused by the deployment of troops from the Virginia Tidewater area to the Persian Gulf War. The Respondent did not know of Hatchett's prounion sympathies at the time of his layoff and the layoff itself is not alleged to have been unlawful.

carry the initial burden of showing ''that the protected conduct was a 'motivating factor' in the employer's decision.'' Once the General Counsel has satisfied this burden, the burden shifts to the employer ''to demonstrate that the same action would have taken place even in the absence of the protected conduct.''[21] Applying this analysis here, we agree with the judge's implicit finding that the General Counsel met its initial burden of showing that the Respondent's refusal to recall Hatchett was motivated at least in part by his protected activity where Hatchett was at least a competent employee, the Respondent knew of his support for the Union, and the Respondent failed to recall him as job openings arose. Further, we reject the Respondent's assertion in rebuttal that there were no openings to which Hatchett could have been recalled. In this regard, the Respondent first asserts that Hatchett worked at one of the four ''Peninsula stores'' in Newport News and Hampton and that ''[f]or obvious geographical reasons'' employees at those stores work at only the Peninsula stores and rarely transfer outside the Peninsula. The Respondent then argues that because it did not hire any meatcutters at those stores after Hatchett's layoff, its failure to recall Hatchett was not unlawful. We reject this argument.

Initially, we note that the Respondent has presented no evidence to support its assertion that employees at the Peninsula stores worked only at those stores. Even assuming for the sake of argument that those employees did tend to work only at the Peninsula stores, the Respondent lawfully cannot refuse to recall a laid-off employee because of his support for the Union and then seek to justify the failure to recall by limiting the employee's right to recall to stores at which there are no openings. Since the Respondent implicitly concedes that there were job openings at other stores to which Hatchett could have been recalled, we agree with the judge that the Respondent violated Section 8(a)(3) by failing to recall Hatchett as openings became available.[22]

### 7. Gwen Andrews

Gwen Andrews was a meatwrapper at Store 232. In February, Meat Merchandiser Kyle, in the presence of Store Manager Weirich and Meat Manager Simmons, asked Andrews if she had signed an authorization card. Andrews responded that she had. Kyle told Andrews that if the Union got in there would probably be reduced hours, layoffs, and store closures. The judge found, and we agree, that Kyle unlawfully interrogated and threatened Andrews in violation of Section 8(a)(1). On March 5, the Respondent fired Andrews. The Respondent excepts to the judge's finding that Andrews' termination violated Section 8(a)(3). For the following reasons, we adopt the judge's finding of this violation.

The events leading up to Andrews' discharge are fully set out by the judge. In brief, when Andrews reported for work on March 5, Simmons asked her why she had not wrapped the beef tongue the day before. Andrews explained that she had not had time, but, consistent with past practice, had placed the unwrapped beef tongue in the cooler. When Andrews began to wrap some cornish game hens, Simmons told her that he needed her to price and weigh chicken legs. Andrews said ''okay,'' but attempted to finish wrapping the cornish hens. Simmons repeated his request. Andrews replied that she had heard Simmons the first two times. Simmons then ran over to Andrews, ''got in [her] face,'' and asked her ''what the hell'' her problem was. Andrews chuckled a little. Simmons told Andrews that she could go home. As Andrews walked away, Simmons told her not to come back. Believing that she had been fired, Andrews left the store and never returned. The judge found the discharge unlawful. He relied on the facts that the Respondent discharged Andrews, a known union supporter, only 2 weeks before the election, that the Respondent exacted the ultimate discipline, discharge, for a seemingly minor incident, and that Andrews had not previously been disciplined but, in fact, had voluntarily worked an ''all-nighter'' only a month before her discharge.

The Respondent excepts on the ground that Simmons' conduct could not have been motivated by union animus because Simmons himself was prounion. According to the Respondent, the evidence only establishes that ''two union supporters had a personal disagreement which led to Ms. Andrews being sent home for the day.'' The Respondent argues, in effect, that Andrews misinterpreted Simmons' statement that she should not come back and that it was Andrews' responsibility to clarify what Simmons meant. We reject these arguments.

Initially, we agree with the Respondent that Simmons was a prounion employee prior to the time that he learned that meat managers were excluded from the bargaining unit. There is no evidence, however, that his union sympathies continued after he learned that he was excluded from the unit and was, as it were, on the Respondent's team. We note, moreover, that Simmons was present in February when Andrews was unlawfully interrogated and threatened with layoff and store closure. Simmons did not take a prounion position or otherwise display any support for Andrews' position at that time. Thus, we find that the mere fact that Simmons had supported the Union prior to his exclusion from the bargaining unit does not rebut the evidence

[21] *Wright Line*, supra at 1089.

[22] Because the Respondent presented no evidence at the hearing regarding which stores had job openings, we shall leave to compliance the issue of which stores had job openings for which Hatchett was eligible for recall. See *Yerger Trucking*, 307 NLRB 567 fn. 3 (1992).

relied on by the judge in finding that Andrews' discharge was motivated by her support for the Union.

We find equally without merit the Respondent's contention that Andrews misinterpreted Simmons' remarks and that the burden was on her to clarify their meaning. Simmons' direction to Andrews that she not come back is capable of only one interpretation. Andrews reasonably believed that she had been terminated. If, as the Respondent asserts, Andrews misconstrued the Respondent's intent in sending her home, it was the Respondent's obligation to contact Andrews and clarify the situation. The Respondent did not do this. The obvious implication is that the Respondent, having managed to rid itself of a prounion employee, did not want to bring her back only 2 weeks before the election.

### 8. Pamela Jackson

Pamela Jackson began working for the Respondent in September 1989. At the time of the incidents described below, she was a deli clerk at Store 235. On March 9, 1991, Jackson received a very good performance evaluation and a raise. Jackson was also a union supporter who had signed a union authorization card and who, after the April 1991 election, walked the picket line when off duty. The judge found, and we agree, that the Respondent was aware of Jackson's prounion sympathy.

In May, Jackson requested a Saturday off to go to Washington, D.C., to pick up her brother who had recently been shot. Robert Nies, the store manager, and Chris Bush, the district manager, were unable to give Jackson the day off because the only other deli clerk at the store had already requested and received permission to be off that day. On Saturday, Jackson did not go to work, but her boyfriend called the store to say that she was sick. The Respondent did not open the deli department that day. On Sunday, Jackson called the store to find out what her schedule was for the next week, and she was told she was not on the schedule because she had not come to work on Saturday. On Monday, Jackson called Bush and explained that she had been sick on the previous Saturday. Bush told her not to return to work unless she had a doctor's note. Jackson had no doctor's note, so, in acquiescence to Bush's direction, she did not return to work.

The judge found that the Respondent discharged Jackson in violation of Section 8(a)(3) by conditioning her return to work on the submission of a doctor's note. The judge reasoned that although Jackson may not have been sick on the Saturday at issue, the Respondent would not have conditioned her return to work on the submission of a doctor's note if she had not been a union supporter. We agree, and for the following reasons we reject the Respondent's exceptions to the judge's finding.

Even assuming that the Respondent had grounds for disbelieving Jackson's claim that she was absent because of illness, and thus had good cause to ask for verification of her claim, it had no grounds for telling her she could not come to work without a doctor's note. The Respondent did not establish that it had any policy mandating discharge whenever an employee, under suspicious circumstances, attributed an absence to illness and failed to produce a doctor's note. Indeed, it argues in its brief on exceptions that, under its policy, an employee in Jackson's circumstances ''would not have been terminated for not coming to work but only written up.'' What the Respondent now, in essence, attacks is the judge's finding (based on Jackson's testimony) that Bush told Jackson she could not come to work without the note. We see no reason for overturning the judge's evident crediting of Jackson over Bush,[23] and therefore we agree that the Respondent effectively terminated Jackson in violation of its admitted sickness excuse policy.

We disagree with our colleague's dissenting view for similar reasons. Jackson's failure to return to work with an offer of ''other verification that she was sick'' was not a matter of her personal choice but rather of her obedience to her employer's unequivocal command that she not return unless she possessed a note—a command that, as explained above, was inconsistent with what the Respondent now describes as its sickness excuse policy under which Jackson would merely have been written up.

For all of the foregoing reasons, we agree with the judge that the Respondent effectively discharged Jackson and did so for reasons that violate Section 8(a)(3) and (1) of the Act.[24]

---

[23] The judge had expressly observed, regarding Bush's testimony on the discharge of another employee (Sabrina Frazier) that Bush did not ''impress'' him as ''an honest witness.''

[24] Member Cohen dissents with respect to this allegation. In his view, the Respondent had a reasonable basis for believing that Jackson was not sick on the relevant Saturday. Thus, the Respondent could reasonably ask for a doctor's note as a form of verification. Jackson did not produce a doctor's note, nor did she offer any other verification that she was sick. Rather, she chose not to return to work. In these circumstances, Member Cohen would find no unlawful discharge.

Member Cohen notes that his colleagues do not contest the proposition that Respondent had a reasonable basis for disbelieving Jackson's claim that she was ill on Saturday. Nor do they quarrel with the proposition that Respondent could ask for verification of her claim of illness. However, they assert that Respondent ''had no grounds for telling [Jackson] she could not come to work without a doctor's note.'' In Member Cohen's view, if Respondent could ask for verification of illness, it could perforce ask for a doctor's note as the form of such verification. And, if Respondent could ask for verification, it could discipline the employee for refusing to comply. Finally, although Respondent concedes that it would not have discharged Jackson for not working on Saturday, it would and did discharge her for refusing to provide the requested notification.

III.

A. *Access*

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) by denying ''representatives of the Union, who were engaged in lawful union activity and were acting on behalf of employees, access to Respondent's leased property'' at certain store locations. Relying on *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992), and the Board's decision in *Bristol Farms, Inc.*, 311 NLRB 837 (1993), the judge found that the Respondent had the authority to exclude trespassers from its store property and that it had a right to exercise that authority under Virginia law. Accordingly, the judge found that the Respondent did not violate the Act by enforcing its right to keep trespassers, here nonemployee union organizers, off its property.[25]

We do not quarrel with the judge's application of *Lechmere*, supra, to the facts of this case.[26] For the reasons explained below, however, we disagree with his further finding that the Respondent did not disparately enforce its no-solicitation rule and on this basis we reverse the judge to find that the Respondent violated Section 8(a)(1) by denying access to the Union.[27]

The judge has set out the relevant facts. In brief, on April 10, 1991, some 20 days after it lost the election, the Union began picketing at several of the Respondent's stores. Between April 10 and July 31, 1991, the Respondent ordered the picketers and handbillers, often under threat of arrest, from the Respondent's property to the public sidewalks at 16 different stores. The Respondent asserts that in so doing it was enforcing a no-solicitation rule of longstanding that applied to all its stores. Although we agree with the Respondent that it had a corporatewide no-solicitation policy that was in effect when the Union began picketing the Respondent's stores,[28] that is not the end of the discussion.

As the judge found, the Respondent did permit nonunion groups and individuals to solicit in and around its stores both before and after the Union began picketing. In this regard, the judge found that Muslims selling oils and incense were present on a ''pretty constant'' basis in front of Store 232 and were present on a ''regular'' basis in front of Store 236. Further, an ''occasional'' Jehovah's Witness distributed the Watchtower magazine at Store 148 and on one occasion a local Lions Club solicited at that store. Also, Lyndon LaRouche followers on a ''couple of occasions'' handed out literature at Stores 28 and 120. In addition, a person sold a cookbook inside Store 102 and ''occasional[ly]'' individuals sold Girl Scout cookies and greeting cards inside Store 232.[29]

The issue here is whether the solicitation by these outside groups on the Respondent's property is significant enough to warrant a finding that the Respondent disparately enforced its no-solicitation rule by allowing nonunion solicitation on its property while denying the Union access. Although he found that some solicitation did go on and that the Respondent took very little action to stop it, the judge nevertheless found that the Respondent did not disparately enforce its no-solicitation rule ''because the soliciting was isolated and sporadic.'' Contrary to the judge, we find that the Respondent disparately enforced its no-solicitation rule.

Initially, we reject the Union's argument that the Board should apply a per se standard to find that any exception to a no-solicitation rule establishes disparate enforcement of the rule and therefore a violation of the Act. As the Board explained in *Hammary Mfg. Corp.*, 265 NLRB 57 fn. 4 (1982):

> The Board and the courts consistently have held that an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated ''beneficent

[25] In his discussion of this issue, the judge stated that ''[a]t no time were employees of Be-Lo asked to move unless there were non-employee union organizers present as well.'' The Union excepts to this statement on the ground that it implies that employees' Sec. 7 rights are somehow vitiated by the presence of nonemployee union organizers. We find merit in this exception and reject any implication that employees might somehow lose their Sec. 7 rights in the circumstances present here merely by associating with nonemployees. See *Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1177 (D.C. Cir. 1993).

[26] Member Truesdale would apply the test set out in Member Browning's and his dissent in *Loehmann's Plaza*, 316 NLRB 109 (1995) (*Loehmann's II*), and find that the Respondent violated Sec. 8(a)(1) by denying the Union access to its property. See also the dissent in *Leslie Homes*, 316 NLRB 123 (1995). However, Member Truesdale also agrees with his colleagues that the Respondent unlawfully denied the Union access to its property by disparately enforcing its no-solicitation rule.

[27] ''The *Lechmere* decision does not disturb the Court's statement in *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956), that 'an employer may validly post his property . . . if [it] does not discriminate against the union by allowing other distribution.''' *Davis Supermarkets*, 306 NLRB 426, 426 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993).

[28] That the no-solicitation rule was corporatewide is evidenced by Corwin's testimony that the Respondent's no-solicitation policy was ''that inside our stores or the sidewalks or the area immediately around our stores was no solicitation of any kind'' and former Personnel Director Lazer's testimony that the Respondent's no-solicitation policy was that ''we don't want anyone coming in our stores bothering our employees, soliciting, whatever, and that includes cookies—selling cookies in front of the store, or Boy Scouts selling lottery tickets.''

[29] In its exceptions, the Union asserts that the judge failed to consider numerous other incidents of nonunion solicitation on the Respondent's property and contends that these additional incidents further evidence the fact that the Respondent permitted nonunion solicitation on a regular basis. We note that these alleged incidents that the Union refers to took place after the events at issue here and therefore are of only marginal relevence in determining whether the Respondent disparately enforced its no-solicitation rule during the spring and summer of 1991. In any event, since we find that the Respondent did, in fact, disparately enforce its no-solicitation rule based on the evidence considered by the judge, we find it unnecessary to consider this additional evidence.

acts'' as narrow exceptions to a no-solicitation rule. See, e.g., *Serv-Air, Inc. v. N.L.R.B.*, 395 F.2d 557 (10th Cir. 1968), on remand 175 NLRB 801 (1969); *Emerson Electric Co., U.S. Electrical Motors Division*, 187 NLRB 294 (1970). Thus, rather than finding an exception for charities to be a per se violation of the Act, the Board has evaluated the ''quantum of . . . incidents'' involved to determine whether unlawful discrimination has occurred. See, e.g., *Serv-Air, Inc*., 175 NLRB 801 (1969); *Saint Vincent's Hospital*, 265 NLRB 38 (1982).

In evaluating the ''quantum of . . . incidents'' in the present case, we find that they are not limited to the ''tolerance of isolated beneficient solicitation'' contemplated in *Hammary*, supra at 57 fn. 4, but are so frequent as to establish the Respondent's disparate treatment of union activity. In this regard, although the Respondent had a corporatewide no-solicitation policy, it was breached ''occasional[ly]'' at several stores and on a ''regular'' basis at two stores. Thus, the Respondent permitted the sale of Girl Scout cookies and greeting cards, the distribution of the Watchtower magazine, and of political literature on more than an ''isolated'' basis at several stores and allowed the sale of incense and oils by nonunion groups at two stores on a more or less constant basis both before the union campaign commenced and thereafter. During this same period, however, the Respondent consistently and rigorously enforced its no-solicitation rule on a corporatewide basis against the Union to deny the Union access to its property at all stores where union picketers and handbillers appeared.

In finding that the Respondent enforced its no-solicitation rule in a discriminatory manner, we do not believe that we are running afoul of any Supreme Court precedent. We are aware that the Board has recently been faulted for remaining ''silent'' concerning the implications of the Supreme Court's decision in *Perry Ed. Assn. v. Perry Local Educators' Assn*., 460 U.S. 37 (1983), for discriminatory treatment analysis in cases involving nonincumbent unions' use of an employer's private property. *Guardian Industries v. NLRB*, 49 F.3d 317, 320–322 (7th Cir. 1995). In *Perry*, a public sector employment case in which the rival to an incumbent union was seeking access to a school system's interschool mail facilities, the Court held that, even assuming that the school system's grant of access to some organizations transformed the internal mail system into a '''limited' public forum, the constitutional right of access would in any event extend only to other entities of similar character.'' 460 U.S. at 48. The Court deemed ''the Girl Scouts, the local boys' club, and other organizations that engage in activities of interest and educational relevance to students,'' to be different in character from the union seeking access, since it, by contrast, was ''concerned with the terms and conditions of teacher employment.'' Id.

We cannot determine from that terse comparison any clear universal principle for judging similarity of character in organizations. To the extent that the Court was distinguishing between groups with messages targeted to the educational mission of the schools and those, like the nonincumbent union, with messages more narrowly targeted to the employment interests of the teachers, we find the test unhelpful in the present case. There is no parallel distinction to be made between, on the one hand, the Muslim incense sellers and the religious and political pamphleteers, and, on the other, the unfair labor practice protesters from the Union. Rather, we infer that because the Respondent took a laissez-faire approach to the religious and political groups, while ejecting the union protesters through lawsuits and threats of arrest, it was thereby following a policy of ''discriminat[ing] against the [U]nion'' within the meaning of *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112 (1956), ''by allowing other distribution.'' We see nothing in *Perry* that would foreclose this analysis; and we also note that it is consistent with what was accepted in cases identified in *Babcock*, supra, as containing elements of ''discrimination.'' Id. at 111 fn. 4. Thus, in *NLRB v. Stowe Spinning Co*., 336 U.S. 226, 228–229 (1949), discrimination was deemed present because an ostensible rule restricting use of a meeting hall to the association for which it had been built had evidently not been enforced before a union organizer tried to use the hall. The Board's decision in *Stowe* (70 NLRB 614, 622 fn. 9 (1946)) had relied on, inter alia, *Gallup American Coal Co*., 32 NLRB 823, 829 (1941), enfd. 131 F.2d 665 (10th Cir. 1942), in which a discrimination finding was based on evidence that an employer allowed signs ''of an advertising or religious nature'' on its property, while obliterating signs giving information about the union. See also *Carolina Mills, Inc*., 92 NLRB 1141, 1166 (1951), cited in *Babcock* (finding an employer's prohibiting the distribution of union literature on its property to constitute unlawful discrimination since it had allowed distribution of certain other (unidentified) literature around the same time). In our view, we are not straying from that line of cases when we infer antiunion discriminatory motives from the Respondent's persistence in ejecting union agents while tolerating intermittent, but not infrequent, solicitations on its property by purveyors of incense and religious literature.

We also believe that the instant case is distinguishable from *Guardian Industries*, supra. In that case, the court indicated that an employer could lawfully draw a distinction beween ''swap and shop notices'' and announcements of meetings of all organizations. Consistent therewith, the employer could bar an announce-

ment of a union meeting. By contrast, in the instant case, the Respondent permitted a broad range of activities, including activities that communicated ideas. In these circumstances, the Respondent could not prohibit activity that communicated the message that the Respondent had committed unfair labor practices.

Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) by disparately enforcing its no-solicitation rule on a corporatewide basis.

### B. *The Injunctions*

Because we have reversed the judge to find that the union picketers did have a Section 7 right to be on the Respondent's premises and that the Respondent violated Section 8(a)(1) by denying them access to its property, we adopt the judge's further finding that the Respondent violated Section 8(a)(1) by maintaining its state trespassory actions after the General Counsel issued complaints alleging that the denial of access was unlawful. As the Board explained in *Loehmann's Plaza*, 305 NLRB 663, 671 (1991) (fns. omitted; emphasis added):

> [A]t the point of preemption, the special requirements of *Bill Johnson's* [461 U.S. 731 (1983)] do not apply. Rather the ''normal'' requirements of established law apply. Under settled principles, a violation of Section 8(a)(1) is established if it is shown that the employer's conduct has a tendency to interfere with a Section 7 right. Accordingly, *if the Board finds that picketing or handbilling on the property in question is protected by Section 7*, and if a preempted state court lawsuit is aimed at enjoining that Section 7 activity, it is clear that the lawsuit tends to interfere (indeed, it is designed to stop) the exercise of a Section 7 right. Accordingly, the lawsuit is unlawful under Section 8(a)(1).

Having found this violation, we agree with the judge that the Respondent is obligated to make the Union whole for legal and other expenses it incurred in connection with the Respondent's unlawful maintenance of the injunctions against the Union between September and December 1991.[30]

## IV. THE BARGAINING ORDER

In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court set out the criteria applicable in determining whether the imposition of a bargaining order is justified. These criteria are set out in *Davis Supermarkets v. NLRB*, 2 F.3d 1162, 1171 (D.C. Cir. 1993):

> [Under *Gissel*] there are two categories of cases in which the Board may issue a bargaining order: ''exceptional cases marked by outrageous and pervasive unfair labor practices'' (''Category I'') and ''less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election process'' (''Category II'').
>
> In Category II cases, before we will enforce a bargaining order, we must find that substantial evidence supports three conclusions: (1) at some time, the union had majority support within the bargaining unit; (2) the employer's unfair labor practices have had the tendency to undermine majority strength and impede the election process; and (3) the possibility of erasing the effects of past unfair labor practices and of ensuring a fair rerun election by the use of traditional remedies is slight, and the once-expressed sentiment in favor of the union would be better protected by a bargaining order. (Citations omitted.)

Applying these criteria here, the judge found that whether this case is categorized as a ''Category I'' or ''Category II'' case, the issuance of a bargaining order is fully warranted where the Union enjoyed majority support as of March 20, 1991, and the Respondent committed ''hallmark'' violations.[31] We find that the effect of those violations renders the holding of a fair rerun election impossible, and we agree with the judge that a bargaining order is both warranted and necessary to remedy the effects of the Respondent's unfair labor practices.[32]

The Respondent excepts to the judge's imposition of a bargaining order on the grounds that the three factors necessary to support a *Gissel* bargaining order are absent here. Thus, the Respondent asserts that: (1) the Union never had the support of a majority of employees working in the bargaining unit; (2) the alleged unfair labor practices neither undermined nor impeded the election process; and (3) even assuming that the Respondent committed the violations found by the

[30] The Respondent excepts to the judge's retroactive application of *Loehmann's*, supra, to this case. For the reasons set out in *Loehmann's*, supra at 672, we find that the retroactive application of that case does not work a ''manifest injustice'' to the parties here. Accordingly, we find this exception without merit.

[31] As the Board explained in *Highland Plastics*, 256 NLRB 146, 147 (1981):

> It has long been established that the threat of loss of employment, discharge of union adherents, and the threat of plant closure . . . are likely to have a lasting inhibitive effect on a substantial percentage of the work force, and therefore are considered ''hallmark'' violations which support the issuance of a bargaining order, unless some significant mitigating circumstances exist. (Fns. omitted.)

[32] Since we agree with the judge that this case clearly satisfies the greater burden imposed under the three-part inquiry applied in Category II cases, we find it unnecessary to decide whether this case falls within ''Category I'' or ''Category II.'' See *Davis Supermarkets*, supra at 1171.

judge, a fair rerun election can be held. For the reasons explained below, we find these arguments without merit.

As to the judge's finding that the Union enjoyed majority support on March 20, 1991, the Respondent argues that the judge erred in finding both that there were 756 eligible employees in the bargaining unit as of March 20, 1991, and that 403 of those employees, a majority, had signed cards authorizing the Union to represent them. The Respondent contends that the judge erred by relying solely on the final voter eligibility list that was prepared at the end of January 1991 in his analysis of whether the Union had achieved majority status. The Respondent asserts that the judge should have considered evidence of turnover in the bargaining unit during February and March (i.e., during the period between the preparation of the final voter eligibility list and the election), and that such turnover, as evidenced by the Respondent's weekly work schedules and timesheets for each store during this 2-month period, would show that the Union lacked majority support. In this regard, the Respondent contends that since the judge arrived at the number of eligible voters by counting not only the authorization cards of employees who signed cards prior to January 26, the eligibility cutoff date, but also the cards of employees who signed cards between January 26 and March 21, the date of the election, the judge should also have included in his calculations that between January 26 and March 21, 44 of 62 employees who left the Respondent's employment had signed authorization cards and that only 3 of the 75 employees hired during that same period signed cards. Thus, the Respondent asserts that as evidenced by the timesheets and work schedules for February and March, there were 769 employees in the bargaining unit as of the date of the election, and that only 362, or less than a majority, had signed authorization cards. We reject this argument for the following reasons.

First, as the judge found, the General Counsel in good faith reasonably relied on General Counsel Exhibit 63 as the final voter eligibility list for the purpose of proving majority status.[33] In this regard, on the first day of the hearing, February 18, 1992, the Respondent moved to quash item 27 of the General Counsel's subpoena that requested ''[p]ayroll records reflecting all bargaining unit employees employed by BE-LO for each pay period from February 1, 1991 through April 1, 1991.'' Counsel for the General Counsel explained that the General Counsel requested this payroll information to help establish the Union's majority status during the relevant time period for the purpose of satisfying the requirements for a *Gissel* remedy. In this regard, counsel for the General Counsel stated that he was seeking ''a listing of all bargaining unit employees for each of those payroll periods [in February and March] . . . a listing like they provided to the Board for the [*E]xcelsior* list for the election.'' In response, the Respondent's attorney stated that ''the *Gissel* remedy can only be as of the date that the union claims it has majority status . . . and it was certainly before the election. . . . Now, the election was March 21, and there were certainly some deletions from the [*E]xcelsior* list for those employees who were not on the payroll as of the date of the election. *Those deletions were made and the Board has that list as of March 21. They have it.*'' (Emphasis added.) Based on the Respondent's assurances, the General Counsel relied on GC 63, the final voter eligibility list, to establish that a majority of unit employees had signed cards as of March 20, 1991.[34] Only on July 8, 1992, some 5 months into the hearing and after the General Counsel had rested, did the Respondent assert that the General Counsel could not rely on GC 63 to show majority status.

Based on this record, we agree with the judge that the counsel for the General Counsel relied reasonably and in good faith on GC 63 in presenting evidence of the Union's majority status and that the Respondent waited until too late in the day to contend otherwise. Further, we also agree with the judge that the Respondent's proffered evidence of work schedules and timesheets is seriously defective, because employees could be out of work during the relevant time period for various reasons, such as maternity leave, and therefore not listed on the work schedules and timesheets even though they would still be in the Respondent's employ and eligible to vote. In addition, we observe that the Respondent did not proffer work schedules and timesheets for all the stores in the bargaining unit during the relevant time period. Accordingly, we find the Respondent's belatedly proffered evidence is seriously flawed, and that the judge did not err in finding that the ''best evidence'' of the number of employees in the bargaining unit as of March 20 is GC 63, the final voter eligibility list. See *Bannon Mills*, 146

[33] G.C. Exh. 63 (GC 63), the final voter eligibility list on which the judge relied to determine the number of eligible voters in the bargaining unit, contains the names of the employees listed on G.C. Exh. 64, the *Excelsior* list of the Respondent's bargaining unit employees who were working as of the payroll cutoff date of January 26, 1991, but with certain additions and deletions made at the March 19 preelection conference. GC 63 contains the names of 765 employees. The judge, however, excluded nine employees from the bargaining unit on the grounds that two of them were guards and the remaining seven were statutory supervisors. We agree with the judge, for the reasons stated by him, that there were 756 employees in the bargaining unit as of March 20, 1991.

[34] We note that the Union also relied on GC 63 in presenting its evidence concerning majority support. Thus, the Union only called as witnesses individual card signers who were listed on GC 63.

NLRB 611, 633–635 (1964), and *Control Services*, 303 NLRB 481, 483, and 491 (1991).[35]

The Respondent also contends that even assuming that the judge correctly relied on GC 63 to determine the number of eligible voters, he nevertheless erred in finding that there were 403 valid authorization cards that evidenced majority support for the Union. In this regard, the Respondent contends that certain cards which the judge found were valid should be excluded because they either were solicited by statutory supervisors or were obtained under the misrepresentation that the cards would only be used to get an election. We find it unnecessary to pass on these contentions because even excluding these cards the Union still enjoyed the support of an uncoerced majority of unit employees on March 20, 1991.[36]

We turn next to a consideration of the Respondent's second argument, that the alleged unfair labor practices neither undermined nor impeded the election process. Citing *Avecor, Inc. v. NLRB*, 931 F.2d 924, 934 (D.C. Cir. 1991), for the proposition that ''[w]here a fair rerun election is possible, it must be held,'' the Respondent contends that a fair rerun election is possible here because the alleged unfair labor practices were isolated and sporatic in nature, affected only a small number of employees in the large bargaining unit, and were alleged to have been committed by relatively low ranking supervisors rather than high level management officials. We disagree.

As the Board explained in *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), the Board applies the following standard to determine whether a bargaining order should issue:

> In determining whether a bargaining order is appropriate to protect employee sentiments and to remedy an employer's misconduct, the Board examines the nature and pervasiveness of the employer's practices. In weighing a violation's pervasiveness, relevant considerations include the number of employees directly affected by the violation, the size of the unit, the extent of dissemination among the work force, and the identity of the perpetrator of the unfair labor practices.

Applying this standard here, we agree with the judge for the following reasons that a bargaining order is fully warranted here.

First, there can be no question regarding the serious nature of the unfair labor practices committed by the Respondent before, during, and after the election campaign. Beginning in May 1990, when Manual Saunders, the owner of three stores and a member of the Respondent's board of directors, threatened an employee with a cut in hours and job loss if the Union won the election, until December 1991, when the Respondent finally moved to stay the five state-court trespass actions that it had unlawfully maintained against the Union, the Respondent engaged in an aggressive campaign to prevent the Union from successfully organizing its employees. While the Respondent's unfair labor practices during this period were extensive, the vast majority of them were committed during the weeks just prior to the March 21, 1991 election. Thus, of over 50 threats of store closure, job loss, and layoffs that the judge found, over 30 of these hallmark violations occurred in February and March 1991. During this same period, the Respondent unlawfully threatened employees with more onerous working conditions, cuts in hours, and pay cuts, unlawfully interrogated employees regarding the Union, created the impression of surveillance, and disparately enforced its work rules against the Union to prohibit union apparel, union buttons, and conversations about the Union. In March, as the election approached, the Respondent not only threatened employees with discharge, but actually discharged six union adherents because of their support for the Union. Finally, the Respondent reinforced its central, unlawful, message equating unionization with store closure and job loss shortly before the election by sending each bargaining unit employee a letter and ''PINK SLIP'' which, as we have found above, itself

[35] Although this case is distinguishable from *Bannon Mills*, supra, and its progeny because the judge here found that the Respondent did comply with the subpoena, we find that the principle that *Bannon Mills* stands for, the protection of the integrity of the hearing process, is properly invoked here where the General Counsel relied in good faith on the Respondent's affirmation on the first day of the hearing that the final voter eligibility list was, in effect, the best evidence of the number of employees in the bargaining unit prior to the election for the purpose of establishing a *Gissel* majority. See *Smitty's Supermarkets*, 310 NLRB 1377, 1380 (1993) (courts of appeals have approved of the Board's use of sanctions such as those provided in *Bannon Mills* because of ''the Board's inherent 'interest' in maintaining 'the integrity of the hearing process'''').

[36] In reaching this conclusion, we observe that even excluding the 14 cards that the Respondent contends were solicited by statutory supervisors and the, at most, 7 cards that the Respondent asserts were obtained by misrepresentation, 382 employees—a majority in a bargaining unit of 756 employees—signed single-purpose authorization cards in support of the Union prior to the election.

The Respondent also argues that the cards of 43 employees or former employees should be excluded on the basis of their testimony that they were also told that the single-purpose cards would be used only to gain an election and that 13 additional cards should be excluded because they were not properly authenticated. We find these arguments without merit. As to the former, the judge specifically discredited the testimony of each of the Respondent's witnesses and credited the contrary testimony of the General Counsel's witnesses. The Respondent has offered no evidence that would warrant setting aside the judge's credibility resolutions and we affirm those findings here. As to the latter, it is well established that an administrative law judge may determine the authenticity of cards by signature comparison. See, e.g., *Action Auto Stores*, 298 NLRB 875, 879 (1990), enfd. mem. 951 F.2d 349 (6th Cir. 1991). The judge here authenticated the cards at issue through a comparison of the signatures on the cards with those on the appropriate W-4 forms. In these circumstances, we adopt the judge's findings that the 13 cards are authentic.

constituted an unlawful threat of store closure and job loss that had a direct impact on each member of the bargaining unit.

Second, we are also convinced that the Respondent's misconduct includes the type of severe and pervasive coercion that has lingering effects and is not readily dispelled by the passage of time. In this regard, we emphasize that every bargaining unit employee was directly affected by the Respondent's unlawful threats of store closure and job loss because every employee received a ''PINK SLIP'' a few days before the election. The impact of these unlawful threats, which are not only ''hallmark'' violations, ''but are among the most flagrant of unfair labor practices,''[37] cannot be underestimated. Further, the Respondent committed such hallmark violations at 15 of the 30 stores in the bargaining unit and unlawfully discharged employees at 7 of those 30 stores.

We also emphasize that management from top to bottom was involved in the Respondent's antiunion campaign and committed the serious hallmark violations found above. Rex Corwin, the Respondent's president; District Manager Bert Harrell; the son of Harrell and Harrell's president; Bobby Harrell Sr., the secretary of the Harrell and Harrell stores; and Bobby Harrell Jr., the manager of one of the Harrell and Harrell stores, threatened employees with store closure and job loss or otherwise violated the Act during the weeks prior to the election. In addition, Jack Scott, the Respondent's vice president for operations, threatened store closure and job loss less than a week before the election. Further, four district managers and four merchandisers also committed violations prior to the election.[38] Finally, various store managers, comanagers, and assistant managers also committed hallmark violations. Thus, from the widespread nature of the misconduct and the participation of management from top to bottom in the Respondent's unlawful campaign against the Union, a campaign that lasted well over a year, we conclude that the Respondent's misconduct had such a pervasive effect upon the bargaining unit that the possibility of a fair rerun election would be unlikely.

Finally, we address the Respondent's third argument, that even assuming the violations found did occur, a fair rerun election is still possible. In support of this argument, the Respondent contends that turnover among both the unit employees and management officials since the election mitigates the effect of the Respondent's violations on the bargaining unit and makes a fair rerun election possible. In this regard, the Respondent asserts that more than 500 employees had left the bargaining unit in the year and a half following the election and that several of the Respondent's management officials who were responsible for many of the violations, including Rex Corwin, the Respondent's president, have also left the Respondent. We find these arguments without merit.

Initially, we emphasize that ''[t]he Board has specifically held that 'the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed' [and therefore] the evidence the Respondent proffers regarding changes of this nature . . . are irrelevant considerations when assessing the propriety of issuing a *Gissel* bargaining order.''[39] We will address this issue, however, because some courts have refused to enforce bargaining orders where the Board did not consider the impact of employee turnover.[40] For the following reasons, we find that the Respondent's evidence of turnover, standing alone, is not sufficient to establish ''that a free and fair election could occur among current employees.''

Although the Respondent asserts that some 500 bargaining unit employees have left its employment, there still remain over 250 employees, one third of the original bargaining unit.[41] In these circumstances, where a substantial number of employees remain who were employed at the time the Respondent committed serious unfair labor practices and were, indeed, directly affected by them, we cannot find, as the Respondent would have us do, that new employees would not be affected by the Respondent's prior unlawful conduct. As the Fifth Circuit has observed: ''Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed.''[42]

The Respondent points to no action that it took to eradicate the effects of its unlawful threats of closure and discharge, and its actual discharge of union adherents. The evidence, indeed, is to the contrary. After the election, the Respondent unlawfully discharged four more employees and unlawfully failed to recall one employee from layoff. In addition, beginning in April,

[37] *Holly Farms Corp*., supra at 282.

[38] The parties stipulated that district managers and merchandisers are statutory supervisors and agents of the Respondent.

[39] *Salvation Army Residence*, 293 NLRB 944, 945 (1989) (footnotes omitted), enfd. mem. 923 F.2d 846 (2d Cir. 1990).

Member Cohen does not necessarily agree that events occurring after the commission of the unfair labor practices are irrelevant to the question of whether a bargaining order should issue. However, for the reasons set forth herein, he agrees that the bargaining order is appropriate here notwithstanding such events.

[40] See, e.g., *Avecor v. NLRB*, supra.

[41] In cases of similar or even higher turnover, however, courts have approved the Board's issuance of a *Gissel* bargaining order. See, e.g., *Salvation Army Residence*, 293 NLRB at 946 (bargaining order remained valid where new employees constituted 64 percent of the work force; *Action Auto Stores*, 298 NLRB 875 fn. 3 (1990), enfd. mem. 951 F.2d 349 (6th Cir. 1991) (bargaining order remained valid where new employees constituted 75 percent of work force).

[42] *Bandag, Inc*., 583 F.2d 765, 772 (5th Cir. 1978), cited in *Salvation Army Residence*, 293 NLRB at 945.

the Respondent discriminatorily applied its no-solicitation rule to deny the Union access to its property for the purpose of peaceful picketing and threatened picketers with arrest. Finally, as explained above, the Respondent unlawfully maintained state court trespass actions against the Union even after the Board had issued a complaint against the Respondent and required the Respondent to stay those actions. Thus, it is clear that in the months after the election the Respondent's management was intent on continuing its extensive antiunion campaign. In this regard, we note that although Rex Corwin, the Respondent's president at the time of the election, has left the Respondent, other high officials, who were themselves responsible for serious violations of the Act, remain, including Manual Saunders, the owner of three stores and a member of the Respondent's board of directors; the Harrells, who own four stores; and Scott, the Respondent's vice president for operations. The continuing presence of these owners and high officials ''can serve only to reinforce in the minds of the employees the lingering effects of the Respondent's violations.''[43] Further, certain middle and lower level officials still remain who committed a large number of the unlawful acts found by the judge. Thus, the numerous and serious violations found, the participation of management from top to bottom, and the continuation of the Respondent's unlawful conduct after the election, ''show that the Respondent is deeply committed to its antiunion position, a commitment from which it is not likely to retreat.''[44] For all these reasons, we find that ''the cloud created by these violations [is] likely to linger''[45] and cannot be dispersed by a traditional cease-and-desist order.

In light of the foregoing, we agree with the judge that a fair rerun election is impossible and that the employees' representation desires expressed through authorization cards would be better protected, on balance, by the issuance of a bargaining order.

## ORDER

The National Labor Relations Board orders that the Respondent, Be-Lo Stores, Norfolk, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in activity on behalf of the Union.

(b) Threatening employees with closure of the stores and job loss if they select the Union as their collective-bargaining representative.

(c) Interrogating employees regarding their union sympathies or desires.

(d) Threatening to discharge employees because of their support for the Union.

(e) Creating the impression among its employees that their union activities are being surveiled.

(f) Threatening to reduce the work hours of employees or lay off employees or impose stricter working conditions on employees should they select the Union as their collective-bargaining representative.

(g) Informing employees that they cannot engage in activities on behalf of the Union while employed by Be-Lo.

(h) Threatening the arrest of employees to enforce its discriminatory rule prohibiting employees from wearing union-related apparel at work.

(i) Harassing its employees because of their support for the Union.

(j) Adopting and enforcing a discriminatory rule prohibiting employees from wearing union-related apparel at work.

(k) Adopting and enforcing a discriminatory rule prohibiting employees from discussing the Union while at work.

(l) Discriminatorily enforcing a no-solicitation rule against the Union.

(m) Maintaining and continuing state court trespass actions after the issuance of a complaint alleging interference with peaceful protected picketing or handbilling.

(n) Refusing to recognize and bargain collectively with United Food and Commercial Workers Union, Local 400, AFL–CIO, CLC as the exclusive collective-bargaining representative of the employees in the appropriate unit.

(o) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions (at different stores if necessary), without prejudice to their seniority and other rights and privileges, to the following employees:

> Jamie Wischmann Cottrell, Kelly Call, Erwin Hatchett, Gwen Andrews, Lavonne Billups, Angela Cox, Sabrina Frazier, Kim Howell, Michael Salazar, Shirley Terry, and Pamela Jackson.

(b) Make the employees listed in paragraph 2(a) above whole for any loss of pay and other benefits suffered by them commencing from the date of their unlawful discharge or refusal to recall from layoff. Back-

---

[43] *Salvation Army Residence*, supra at 945.

[44] Id.

[45] *Avecor, Inc. v. NLRB*, 931 F.2d at 938. Although the passage of time is regrettable, it was caused in large part by the length of the trial in this case and the extensive record that resulted. In any event, because the Respondent's preelection violations were subsequently reinforced by its postelection unfair labor practices, passage of time does not warrant the withholding of a bargaining order. See *Eddyleon Chocolate Co.*, 301 NLRB 887, 891 fn. 28 (1991).

pay to be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

(c) Make whole employees Lavonne Billups and Kelly Riddick for unlawfully reducing the former's hours and unlawfully suspending the latter for 1 day in April 1991.

(d) Remove from its files any references to the discharges, suspensions, or refusals to recall from layoff, or written warnings of the persons listed in paragraphs 2(a) and (c) above and notify them in writing that this has been done and that evidence of their unlawful discipline will not be used as a basis for future personnel action against them.

(e) Reimburse the Union for all legal expenses, plus interest, incurred in connection with the five state injunction cases in the Tidewater area between September 12, 1991, when a complaint issued alleging the access issues, and December 1991 when the Respondent moved to stay the injunctions.

(f) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.

(g) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay or other moneys due under the terms of this Order.

(h) Post at all stores in the unit copies of the attached notice marked ''Appendix.''[46] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(i) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that objections filed by the Union to the election in Case 11–RC–5823 (formerly Case 5–RC–13449) are sustained, the election of March 21, 1991, is set aside, and the petition there is dismissed.

[46] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees who engage in activity on behalf of the Union.

WE WILL NOT threaten employees with closure of the stores and job loss if they select the Union as their collective-bargaining representative.

WE WILL NOT interrogate employees regarding their union sympathies or desires.

WE WILL NOT threaten to discharge employees because of their support for the Union.

WE WILL NOT create the impression among our employees that their union activities are being surveiled.

WE WILL NOT threaten to reduce the work hours of employees or threaten to lay off employees, or threaten to impose stricter working conditions on employees should they select the Union as their collective-bargaining representative.

WE WILL NOT inform employees that they cannot engage in activities on behalf of the Union while employed by Be-Lo.

WE WILL NOT threaten the arrest of employees to enforce our discriminatory rule prohibiting employees from wearing union-related apparel at work.

WE WILL NOT harass our employees because of their support for the Union.

WE WILL NOT adopt and enforce a discriminatory rule prohibiting employees from wearing union-related apparel at work.

WE WILL NOT adopt and enforce a discriminatory rule prohibiting employees from discussing the Union while at work.

WE WILL NOT discriminatorily enforce our no-solicitation rule against the Union.

WE WILL NOT maintain or continue state court trespass actions after the issuance of a complaint alleging interference with peaceful protected picketing or handbilling.

WE WILL NOT refuse to recognize and bargain collectively with United Food and Commercial Workers Union, Local 400, AFL–CIO, CLC as the exclusive collective-bargaining representative of the employees in the appropriate unit.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions (at different stores if necessary), without prejudice to their seniority and other rights and privileges, to the following employees:

> Jamie Wischmann Cottrell, Kelly Call, Erwin Hatchett, Gwen Andrews, Lavonne Billups, Angela Cox, Sabrina Frazier, Kim Howell, Michael Salazar, Shirley Terry, and Pamela Jackson.

WE WILL make the employees listed above whole for any loss of pay, plus interest, and other benefits suffered by them commencing from the date of their unlawful discharge or our unlawful refusal to recall from layoff.

WE WILL make whole employees Lavonne Billups and Kelly Riddick for unlawfully reducing the former's hours and unlawfully suspending the latter for 1 day in April 1991.

WE WILL remove from our files any references to the discharges, suspensions, or failures to recall from layoff or written warnings of the persons listed above and notify them in writing that this has been done and that evidence of their unlawful discipline will not be used as a basis for future personnel action against them.

WE WILL reimburse the Union for all legal expenses, plus interest, incurred in connection with the five state injunction cases in the Tidewater area between September 12, 1991, when a complaint issued alleging the access issues, and December 1991 when we moved to stay the injunctions.

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.

## BE-LO STORES

*Donald R. Gattalaro* and *Michael W. Jeannette, Esqs.*, for the General Counsel.

*Stanley G. Barr Jr., Charles V. McPhillips*, and *James Shoemaker, Esqs. (Kaufman & Canoles)*, of Norfolk, Virginia, for the Respondent.

*Carey Butsavage* and *George Wiszynski, Esqs. (Butsavage & Associates, P.C.)*, of Washington, D.C., for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

MARTIN J. LINSKY, Administrative Law Judge. Between November 9, 1990, and January 24, 1992, numerous charges and amended charges were filed by the United Food and Commercial Workers Union, Local 400, AFL–CIO, CLC (the Union or Charging Party) against Be-Lo Stores (Respondent).

On February 6, 1992, the National Labor Relations Board, by the Regional Director for Region 11, issued a second consolidated complaint (the complaint) which alleged that Respondent committed numerous unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). Among the remedies sought in the complaint is a bargaining order.

Respondent filed an answer to the complaint in which it denied that it violated the Act in any way.

Trial was held before me in Norfolk, Virginia, on 57 days between February 18 and October 21, 1992.[1]

Over 200 witnesses testified and over 300 exhibits, not including over 500 union authorization cards, were introduced into evidence.

On the entire record in the case, to include posthearing briefs timely submitted on April 8, 1993, by the General Counsel, Respondent, and the Charging Party, and on my observation of the demeanor of the witnesses, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is now, and has been at all times material herein, a corporation with various retail grocery stores located throughout the Tidewater area of the Commonwealth of Virginia.

Respondent admits that during the 12-month period prior to the issuance of the complaint tried before me, which is a representative period, it received at its Virginia retail grocery stores goods and raw materials valued in excess of $50,000 directly from points outside the Commonwealth of Virginia, and received gross revenues in excess of $500,000.

Respondent admits, and I find, that it is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

[1] On January 12, 1993, another complaint was issued (Case 11–CA–15236–1) alleging additional unfair labor practices by Respondent. I reopened the record in the instant case and consolidated it with the new complaint. Trial was scheduled to begin on March 2, 1993, regarding the allegations in the new complaint. Prior to March 2, 1993, however, the parties settled not only the unfair labor practice allegations in the new complaint but an unfair labor practice allegation in the instant case wherein it was alleged that Respondent violated the Act by filing and prosecuting a lawsuit in defamation against the Union in circuit court, Norfolk, Virginia. In addition, at the close of the hearing on October 21, 1992, I dismissed De Hart Enterprises, Inc., as a Respondent in the case.

## II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### Part I

### A. *Introduction and Overview*

The Respondent operates grocery stores. This litigation involves a campaign by the Union to organize Respondent's employees at 30 retail grocery stores, some larger than others, in the Tidewater area of Virginia. Initially the campaign involved just four stores but after an NLRB representation hearing it was stipulated that the appropriate unit consisted of the employees at 30 stores.

Twenty of the stores were owned by Bonnie Be-Lo Markets, Inc., and were referred to in this litigation as the corporate stores and 10 stores were privately owned. All 30 stores are collectively referred to as Be-Lo Stores.

The stores were numbered and located as indicated below:

1. Store No. 28 Norfolk, VA
2. Store No. 37 Norfolk, VA
3. Store No. 44 Norfolk, VA
4. Store No. 47 Norfolk, VA
5. Store No. 59 Chesapeake, VA
6. Store No. 60 Chesapeake, VA
7. Store No. 62 Chesapeake, VA
8. Store No. 63 Chesapeake, VA
9. Store No. 67 Chesapeake, VA
10. Store No. 73 Norfolk, VA
11. Store No. 84 Portsmouth, VA
12. Store No. 96 Virginia Beach, VA
13. Store No. 102 Norfolk, VA
14. Store No. 107 Suffolk, VA
15. Store No. 109 Virginia Beach, VA
16. Store No. 110 Virginia Beach, VA
17. Store No. 111 Norfolk, VA
18. Store No. 120 Portsmouth, VA
19. Store No. 121 Suffolk, VA
20. Store No. 122 Suffolk, VA
21. Store No. 126 Portsmouth, VA
22. Store No. 144 Virginia Beach, VA
23. Store No. 145 Portsmouth, VA
24. Store No. 148 Norfolk, VA
25. Store No. 185 Virginia Beach, VA
26. Store No. 232 Newport News, VA
27. Store No. 233 Hampton, VA
28. Store No. 234 Hampton, VA
29. Store No. 235 Hampton, VA
30. Store No. 236 Newport News, VA

Stores 37, 73, 96, and 148 were privately owned by Harrell and Harrell, Inc. Stores 28, 44, and 47 were owned by JL Saunders, Inc. Store 120 was owned by Pegelin, Inc. Store 84 by LC Shelton, Inc. Store 109 was owned by Raul, Inc., and referred to as the Frank Fentress Store. These were the 10 privately owned stores. The remaining 20 stores were owned by Bonnie Be-Lo Markets, Inc., and were referred to in this litigation as the corporate stores. The employees at all 30 stores constitute the unit.

The organizing campaign began in the spring of 1990 and an election was held on March 21, 1991. The Union lost the election. The vote was 377 to 220 against representation by the Union.

It is alleged that during the campaign Respondent committed numerous violations of the Act to include unlawfully discharging employees.

Further, it is alleged that subsequent to the March 21, 1991 election Respondent violated the Act by discharging more employees, unlawfully denying access to union organizers to picket the stores, and unlawfully maintaining injunction cases against the Union in various state courts in the Tidewater area.

Lastly, it is alleged that the unfair labor practices occurring prior to the election were such that the results of the election should be set aside and due to the lingering effects of those numerous unfair labor practices committed before the election and those committed after the election a fair rerun election cannot be held and, therefore, since the Union can show by authorization cards that it enjoyed majority support among the employees before the election, the Union should be certified as the collective-bargaining representative of the employees in the unit.

Suffice it to say, I conclude that numerous violations of Section 8(a)(1) and (3) of the Act were committed by Respondent and the election results should be set aside. A fair rerun election is so unlikely in view of the unfair labor practices committed by Respondent before and after the election and the lingering effect of those practices that I will recommend to the Board that a bargaining order be issued applying the rationale of the Supreme Court in its unanimous landmark decision in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

I do not find that the Respondent violated the Act by its actions regarding access to the stores for picketing by the Union subsequent to the election but I do find that Respondent violated the Act in not more promptly moving to abate the injunction cases it brought in various state courts in the Tidewater area of Virginia after the Region issued a complaint in September 1991 alleging denial of access as an unfair labor practice.

### B. *Overview of Respondent's Campaign Against the Union*

Respondent's campaign to defeat the union effort to organize the employees at its stores was to let the employees know that the Union's presence in the Tidewater area of Virginia was to organize two larger employers, namely, Food Lion and Farm Fresh, and more significantly to emphasize to its employees that this particular union, Local 400 UFCW, or its predecessor had previously represented employees at other supermarkets in the area, namely, Safeway, A & P, Super Fresh, Colonial Stores, and Big Star and the stores they operated are now all closed and out of business in the Tidewater area. It is clear to me that the thrust of Respondent's message was to equate unionization of food stores in the Tidewater area with the subsequent closure of those stores and to raise an inference in the minds of its employees that if they selected the Union as their collective-bargaining representative they would see their store close and they would find themselves no longer working for Be-Lo.

It goes without saying that a threat of loss of job is the ultimate economic threat to an employee. People define themselves by what they do to make a living. Making a living, i.e., having a job, is how people support themselves and their families. Any threat that they will lose their job and be unable to support themselves and their families until they find another job, which is not always easy, is the kind of threat that cuts to the very marrow of a working man or woman's soul. If unionization and loss of job are connected in someone's mind, i.e., that the latter event flows from the first event it will tend, obviously, to interfere with the exercise of the right to select or not select union representation.

On the other hand an employer may not want his or her work force to be unionized. The employer is free to express that opinion. In a union campaign both sides will use arguments to persuade the voters to their point of view. Section 8(c) of the Act provides as follows:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act if such expression contains no threat of reprisal or force or promise of benefit.

From the outset, Respondent's strategy was to instill in its employees the false and unsupported fear that the Union caused the demise, not only of Virginia grocery competitors, but of union companies in other industries, such as auto and steel, and that, in turn, Respondent's stores would close if the employees voted for the Union.

Just after the Union commenced the organizing campaign, Manual Saunders, the owner of stores 28, 44, and 47 and one of the members of the board of the directors for the so-called corporate stores, on June 7, 1990, wrote Be-Lo ''Associates,'' i.e., employees, that ''[t]he attempt by the union [to organize the Be-Lo employees] raises important questions that every Associate should seriously consider.''

> 2. In light of what happened to Colonial/Big Star, Safeway and A & P/Super Fresh, who were all represented by this same union, what do their promises mean?
>
> . . . .
>
> 5. Union membership is declining in the country as a whole. *If we look at the auto industry, the steel industry and even at the grocery companies in our area that are or were heavily unionized, it isn't hard to see what the effect of a union is.* Don't hitch your wagon to a falling star. [C.P. Exh. 22 (emphasis added).]

During the summer and fall 1990, a script of what Respondent's supervisors were supposed to read or refer to when attempting to convince employees to vote against the union was distributed to all managers. (C.P. Exh. 11.) The script states that ''[t]here are several reasons why union membership is decreasing.''

> (1) Layoffs in unionized industries like auto and steel manufacturing;
>
> (2) Plant and business closings where unions used to represent the employees, like Safeway and Big Star;
>
> (3) Lost elections because workers have gradually learned that unions mean dues and strikes, not better benefits and *certainly not job security*. [C.P. Exh. 11 (emphasis added).]

The script continued: ''Think about the future of Be-Lo if we need to compete with . . . non-union [Food Lion and Farm Fresh] while we are handicapped with a union.'' Id. at 3 (emphasis added). ''We have to do what will best enable us to beat the competition at a very difficult time in our economy. We don't need a union to make things worse.'' Id. at 3 (emphasis added).

The implication of Respondent's intended message became less subtle as the election approached. Shortly before the election, Be-Lo mailed to all of its employees a pink slip stating that ''you may want to take another look at what the UNITED FOOD AND COMMERCIAL WORKERS UNION got for their former dues payers in this area—A PINK SLIP.'' (C.P. Exh. 6.) Attached to that letter was pink colored letter purportedly on Big Star, Safeway, and Colonial Stores letterhead stating:

> Dear Unionized Employees.
>
> I regret to inform you that because *we have lost our ability to compete in this extremely competitive market, we shall be forced to close this store and put you out of work.*
>
> Sincerely,
>
> COLONIAL STORES/BIG STAR SAFEWAY

Id. (Emphasis added.)

Respondent's clear message that unionization means loss of jobs was the central theme at four dinner meetings held in various Tidewater cities which were attended by most of Respondent's employees. During the main speech, Rex Corwin, Respondent's president, said:

> If the union wins the election, the company has one obligation. To meet with the union and discuss wages, benefits and working conditions. *We do not have to agree to one single thing.* [Emphasis in original.]
>
> There is no time limit on negotiations. *It could take years; we might never reach agreement.* The Union has told you it took 20 years to get a contract at Safeway. *Do I have to explain to anyone in this room what happened to Safeway when the union finally got that contract? That's right, they got sold and closed up in this market.* [Emphasis added.]
>
> *I have been asked if Be-Lo will go out of business if the union gets in. I answered that* question by saying, ''I hope not, but *I can't be certain.*'' I then go on to explain the grocery business and *what happened to the union stores*. This is what I have said:
>
> In the grocery business, volume is everything. The more you sell, the more you make. There are two keys to volume: prices and service. As soon as you take both away, *you're out of business. That's what happened to the union stores*. [Emphasis in original.]
>
> For many years, A & P and Colonial Stores had all the business and they were union. Then along came Giant Open Air and Farm Fresh and Be-Lo, and our

costs to operate were less than the union stores so we were able to sell groceries for less. The customers came to us from the union stores which meant their sales dropped. In order for them to lower prices and still make a profit, *they had to cut payroll*. [Emphasis added.]

That meant there were fewer people in the stores to deliver the services the customers were getting in the non-union stores. *It did not take long before the union stores began to close their less profitable stores*. Gradually, *as the independents got bigger and were better able to control costs and provide better prices and services, the union stores just couldn't compete any longer and left this area*. [Emphasis added.]

Super Fresh is in that situation right now. *They have been trying to sell those stores for years but can't find a buyer. They would close up tomorrow if they didn't have rent to pay on the locations and they have far fewer people working in those stores than we do*. [Emphasis added.]

And the same thing happened at Bradlees. *The union got in and they couldn't compete any longer*. [Emphasis added.]

At this point in the program a slide was shown to the employees. Although Corwin and other management officials claim the slide was not shown, a number of credible employees testified it was shown. It is undisputed, however, that the slide was prepared and was turned over pursuant to subpoena. Respondent never offered a credible explanation for why the slide wasn't shown but was prepared as part of the speech. I find that it was shown. The slide contained a tombstone with this inscription:

RIP

Colonial Stores
Big Star
Safeway
A&P
Super Fresh
Bradlees

Q. What ''protection'' did the union give to the employees who worked for these unionized stores when they passed on?

A. ABSOLUTELY NONE!

. . . and for NO reason!

Charging Party Exhibit 14.

Corwin continued:

We think we are the best at [customer service] and that's why we have so many employees in each store. *But because we have so many employees, we have to watch our payroll costs closely*. [Emphasis added.]

. . . .

I'm glad [the Union brought up the Camellia Warehouse contract] because *it proves everything I have said. . . . 17 employees in the warehouse got laid off last week*. I hated to do it but business is that bad. The point is, if a contract is such great protection, *where was the union when these men got laid off*? [Emphasis added.]

. . . .

The union has said a lot about the protection a union contract can bring. Well, *what protection did the contract give to the employees who worked for the union stores that went out of business? None, because the companies had the right to lay off and go out of business, and there wasn't one thing Local 400 could do about it*. [Emphasis added.]

But so much for the unfortunate history of the union stores. I want to talk about the election.

. . . .

We want you to vote on the issues and your security. . . . Don't let a few impose an uncertain future on the majority. Vote as though the future of Be-Lo and your job will be decided. . . . [Emphasis added.] Charging Party Exhibit 13.

In the several months before the March 21, 1991 election Respondent caused a videotape to be shown in each of its stores. Employees were not required to view the video but the evidence at the hearing before me reflects that most employees did view the video. The video consisted of a speech by Respondent's president, Rex Corwin. Certain management officials were selected to show the videotape at Respondent's stores. After the video was shown the management official who showed the video would ask the employees who viewed it if they had any questions. They often did.

A transcription of the video consists of six pages. (C.P. Exh. 10.) The speech included the following:

Unions are having such a hard time getting companies to agree to their outrageous demands that people are leaving unions by the thousands. In Tuesday's newspaper, there was an article which said unions lost 165,000 members last year. That brings the total unionized work force down to 12% or one out of every eight.

The Farm Fresh employees recognized this. Those employees signed cards because of all the fancy money the organizers were talking about. But when they learned what the union was REALLY after, and that the money was in Washington and Baltimore, they knew the union could do nothing for them and voted against it.

Come to think of it, if union stores are such great places to work, why do we have so many employees who use to work for union stores? The reasons are steady work, good benefits and dependable wages—WITHOUT UNION INTERFERENCE.

We need to talk to some of the former Big Star, Safeway and A&P employees and listen to THEIR HORROR STORIES.

Ask Bob Evans at Store 234 how the union talked him into taking a $2.00 per hour pay cut and then they closed the store on him.

Talk to Amy Muckle at Store 47. She can really open your eyes.

You know, it makes me very sad when I hear these stories and listen to what happened to some of those families when the union stores when out of business. I worry that the same thing could happen to Be-Lo employees if WE get unionized and Farm Fresh and Food

> Lion stay non-union. And their employees have already spoken. The union will never organize those two companies.
>
> Think for a second what could happen to Be-Lo if that were to happen. [Emphasis in original.]

I find the above language in Manual Saunders' letter to employees, Respondent's talking points to supervisors, the pink slip sent to employees, the statements in President Rex Corwin's speech to employees shortly before the election, and the text of the video to constitute free speech and legitimate propaganda because I find it does not rise to the level of a threat of reprisal if the employees select the Union as their collective-bargaining representative. See Section 8(c) of the Act, *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969); *Carry Cos. of Illinois*, 310 NLRB 860 (1993); and *Midland National Life Insurance Co*., 263 NLRB 127 (1982). This is so because Respondent did not actually threaten dire consequences if the Union was selected as collective-bargaining representative. However, this propaganda set the stage for individual supervisors to draw the obvious conclusion that if the union got in the stores may or would close, etc. These supervisors understood the subliminal message and conveyed it to the employees as is more fully set out in part II of this decision which will address 8(a)(1) and (3) conduct by Respondent at various stores.

## Part II

### A. *Alleged Unfair Labor Practices at Various Stores*

The employees at 30 Be-Lo stores in the Tidewater area of Virginia made up the unit deemed appropriate for collective bargaining. It is alleged that unfair labor practices were committed by Be-Lo at many of these stores. The alleged unfair labor practices alleged at the various stores will be discussed separately by store. It is stipulated by the parties that store managers, store comanagers, and meat department managers are supervisors and agents of Be-Lo as are district managers, meat merchandisers, and produce merchandisers. In reaching the conclusions I reached regarding the unfair labor practices, I relied heavily on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); and *Rossmore House*, 269 NLRB 1176 (1984). I found numerous threats in violation of Section 8(a)(1) of the Act because the threat of loss of jobs, closure of stores, etc., was never presented as the demonstrable economic consequences of unionization.

#### 1. Store 28, Norfolk, Virginia

Susan Jacobs worked for Be-Lo for some 19 years prior to resigning in August 1991.

She credibly testified that in May 1990, very early in the organizing campaign, Manual Saunders, the owner of store 28 and stores 44 and 47, told her that if the Union won the election, that wages would go up, that he would have to cut hours because Be-Lo could not afford to pay union wages, and that he would be forced to go out of business. This is a threat calculated to interfere with a person's free choice of whether or not to support the Union and violates Section 8(a)(1) of the Act.

She also credibly testified that Store Manager David Bromley asked her in May 1990 if she had received or signed a union authorization card. This is unlawful interrogation in violation of Section 8(a)(1) of the Act. One week before the election in March 1991 Bromley told her he needed all the votes he could get.

Jacobs impressed me as an honest witness with nothing to gain or lose from her testimony. I believe her.

Cashier Crystal Thomas, who resigned from Be-Lo in January 1991 when told by management that she would be fired for excessive cash shortages from her till if she did not resign, credibly testified that Store Manager David Bromley in or about July 1990 told her that if the Union got in it would cause Be-Lo to close stores, people might lose their jobs, and there may be pay cuts. Under all the circumstances these statements are threats in violation of Section 8(a)(1) of the Act. I believe Thomas even though she might be prejudiced against Be-Lo which forced her to resign. The cash shortages reflect not that she was a thief—no one suggests this—but rather that she was a less than totally satisfactory cashier. I saw her on the stand and I believe her.

David Bromley's denial of the incidents described by Jacobs and Thomas was not convincing. Bromley has been with Be-Lo since 1987 and has a good job as a store manager. He was well aware of Be-Lo's desire to avoid the unionization of its work force.

Manual Saunders, while denying the specifics attributed to him by Jacobs, admits that he informed employees in his three stores that Colonial Stores, Big Star, and Safeway were all unionized and all went out of business. It doesn't take a rocket scientist to figure out that unionization equals total disaster in the minds of Manual Saunders who not only owns three stores but is on the board of directors of the corporation that operates the 20 so-called corporate stores.

#### 2. Store 37, Norfolk, Virginia

Store 37 is one of the Harrell and Harrell stores. The other three Harrell and Harrell Stores are stores 73, 96, and 148.

##### a. *Discharge of Meat Manager Tom DeYarmon*

Tom DeYarmon was the meat manager at store 37. He was a supervisor and could be lawfully discharged because be supported the Union but could not be lawfully discharged because he failed to unlawfully prevent union activity among employees or because he refused to violate the Act in his dealings with employees. See *Parker-Robb Chevrolet, Inc*., 262 NLRB 402 (1982).

DeYarmon was very much in favor of the Union. He started with Be-Lo in 1980. He had worked over the years at seven different Be-Lo stores.

According to DeYarmon, James Harrell, the president of Harrell and Harrell, told DeYarmon, after the hearing on unit appropriateness, that DeYarmon, because meat managers were considered supervisors, would not be in the unit, could not vote, and was now on Be-Lo's team and not the Union's team and was expected to let the employees in the meat department under him know that the Union meant loss of jobs and the closing of stores. Harrell instructed DeYarmon to do whatever was necessary to make sure the employees in the meat department voted against the Union.

DeYarmon told the employees in the meat department that he was told to tell them that if the Union got in the employees could lose their jobs. DeYarmon went on to tell the employees, however, that this was not true and that the employ-

ees would not lose their jobs if they selected the Union. One week later DeYarmon was fired.

Prior to March 1991, DeYarmon had never been disciplined by Be-Lo. On March 4, 1991, a Monday when meat deliveries were normally made, DeYarmon reported to work. The usual Monday morning delivery of meat occurred and DeYarmon had to fill the case with lunch meats and also cut meat into steaks, etc. One of the meatcutters did not get to work on time. DeYarmon started filling up the lunch meat case while the meatcutter who was there cut the meat and a meatwrapper wrapped it.

Store Manager L. J. Davis, according to DeYarmon, asked DeYarmon why he was filling the case with lunch meat and not cutting the meat and DeYarmon told him one of the meatcutters was not present for duty and they were doing the best they could and it would all get done.

Later that day DeYarmon, having gotten control of the work, i.e., the lunch meat case was filled and the meat cut, etc., asked Manager L. J. Davis how everything looked and Davis said that everything looked the way it should look.

The following day was DeYarmon's day off. When he returned to work on March 6, 1991, Davis presented DeYarmon with a termination notice which reflected that he was being fired for filling the lunch meat case rather than attending to other duties like cutting meat. When DeYarmon asked Davis what this was all about Davis said he couldn't talk about it.

L. J. Davis, who later retired, was apparently too sick to testify and never did. DeYarmon testified during the first week of trial before me in February 1992. We closed the record in October 1992.

James Harrell denied that the conversation that DeYarmon testified took place between he and Harrell ever took place. I'm inclined to credit Harrell. He did not impress me as a liar. On the other hand, neither did DeYarmon. Accordingly, what I believe occurred is as follows: Harrell, who has since forgotten the incident, did tell DeYarmon he was not allowed to vote and was on Be-Lo's team.

It seems clear that prior to his discharge DeYarmon was well known in store 37 as prounion. Indeed, meat department employee Terry McKinney Huffstickler was called by Respondent and testified that DeYarmon was openly prounion in the meat department and spoke constantly in favor of the Union.

L. J. Davis, who did not testify, is the person who fired DeYarmon. Based on Be-Lo's virulent antiunion posture and the absurd reason advanced for DeYarmon's discharge any rational person would have to conclude that DeYarmon was discharged to prevent unionization. No other explanation is rational. There is no evidence of personal dislike between Davis and DeYarmon. DeYarmon had worked 11 years for Be-Lo, was a supervisor, had never been disciplined before and we are to believe, according to Respondent, that he was discharged for doing one task (filling the meat case with lunch meats) rather than another (cutting meat) and the discharge just 2 weeks before the union election had nothing to do with DeYarmon's well-known prounion posture in a company fighting unionization tooth and nail.

I find the discharge of Tom DeYarmon to be unlawful and in violation of Section 8(a)(3) of the Act.

b. *Discharge of Christopher Sherman*

On February 16, 1991, Christopher Sherman, a part-time bagger at store 37 and a high school student was fired for misconduct toward two customers in the store parking lot.

Sherman was prounion. He signed an authorization card. He solicited another employee to sign a card which was observed by Assistant Manager Brian Weatherly and he spoke with a union organizer where Assistant Manager Jeff Riley could observe him. I believe the General Counsel has proven that Sherman engaged in protected concerted activity on behalf of the Union and Be-Lo knew about it and he was fired just a little more than 1 month before the election. Even if this is enough for a prima facie case I find that Be-Lo presented a strong case that it had serious grounds to discharge Sherman and did so for those reasons and further that it would have done so whether Sherman engaged in protected concerted activity on behalf of the Union or not. In other words, applying the *Wright Line*, supra, analysis I conclude that Respondent did not violate the Act when it discharged Christopher Sherman.

On the night in question Assistant Manager Jeff Riley was approached by regular store customer Lucy Clements who informed Riley that a Be-Lo employee and another young man in the parking lot had made lewd and offensive comments to her and a female friend of hers who was visiting from Indiana. Clements pointed out Sherman and another young man (not a Be-Lo employee) as the persons who had been drinking beer and making lewd comments. Clements clearly identified Sherman to Riley as the person who said to Clements' friend that he would like to perform oral sex on her as well as sexual intercourse. Clements, a long-time customer, was upset. Sherman was on duty at the time of the incident charged with the duty of sweeping up the parking lot. Riley told Sherman to go home and as far as he was concerned Sherman was discharged. Comanager Cheryl Perras later approved the discharge.

Riley credibly testified that he believed Clements and, therefore, Respondent could act on that belief and discharge Sherman. In addition Respondent called Lucy Clements as a witness in the hearing before me. She impressed me as a credible person. Clements appeared to be in her mid to late twenties. Not only did Riley believe Clements but I believed Clements as well and do not credit Sherman's denials. Accordingly, Respondent had ample grounds to discharge Sherman. There is no evidence in the record of similar misconduct occurring and therefore a disparate treatment analysis is difficult but this misconduct is of such a nature that discharge does not appear to be inappropriate. The discharge of Christopher Sherman did not violate the Act.

c. *Discharge of Michael Salazar*

Michael Salazar was discharged on March 11, 1991, less than 2 weeks before the election. It was not the worst blow he suffered during the course of his employment with Be-Lo which began in September 1990 and ended 6 months later. He was mugged and stabbed a couple of weeks before he was fired and much more tragically suffered the loss of his child to sudden infant death syndrome (SIDS).

Salazar was prounion and solicited other employees to sign union authorization cards in the presence of Assistant Managers Jeff Riley and Brian Weatherly. I don't credit

Weatherly's testimony that he was not aware of Salazar's prounion feelings.

Salazar credibly testified that Assistant Manager Jeff Riley told him he could be fired to talking about the Union inside the store. Even though Salazar was working stocking shelves at the time, this was a violation of Section 8(a)(1) of the Act for Riley to threaten discharge for taking about the Union. Anyone who has stocked shelves can tell you that you can stock and talk about unions or sports or politics without the conversation interfering in any way with getting the job done. Salazar was talking about the benefits of unionization when told he could be fired for talking about the Union on the job.

In July 1991 Store Manager L. J. Davis, who did not testify due to illness, asked Salazar how he was going to vote in the upcoming union election. Salazar did not answer the question. This was unlawful interrogation in violation of Section 8(a)(1) of the Act.

On March 8, 1991, Salazar was mugged and stabbed on his way home. Since he had no medical insurance Salazar got treatment at home. He came to work on March 9, 1991, but had to leave due to dizziness as a result of being mugged the night before. On March 10, 1991, Salazar was too sick to work. He went to a store near his home to call work and let them know he wouldn't be in but the phone was out of order.

When Salazar arrived for work on March 11, 1991—10 days before the election—he was fired by Store Manager L. J. Davis. Davis did not testify. While there can be no question that Salazar's attendance record was less than outstanding it is hard to believe that Respondent would fire him on March 11, 1991, when he had—possibly for the first time—a good excuse for his absenteeism. Respondent was unalterably opposed to the unionization of its work force and seized on this opportunity—just 10 days before the election—to fire this prounion employee. I've applied a *Wright Line*, supra, analysis and conclude that Respondent would not have discharged this young man with his hard luck story absent his prounion position.

Salazar's discharge was done in violation of Section 8(a)(3) of the Act. Respondent, according to President Rex Corwin, wanted to know in which stores the Union was strong and in which it was not strong, and managers were told to gauge the union support among their employees. There is no doubt in my mind that Respondent was well aware of Salazar's prounion sympathies. Salazar will be counted as an eligible voter.

### d. *Reduction of hours of Jason Adkins*

Jason Adkins worked for Be-Lo from December 1990 until he resigned in April 1991. He was a high school student during his employment with Be-Lo. He was a grocery bagger.

He testified that he attended one of the dinner meetings conducted by Respondent prior to the election on March 21, 1991. There were four such dinner meetings and President Rex Corwin spoke at all four meetings. Adkins claims that Corwin, at the meeting Adkins attended, promised employees a $500 bonus if they rejected the Union in the upcoming election. I don't believe that Jason Adkins lied when he testified about this. I think he thinks Corwin said this but I find as a matter of fact that Corwin made no such promise of a bonus. Not one other witness corroborates Adkins. In other words, no other witness among the more than 200 called to the stand testified to hearing Corwin say this. Lastly, although I find that Respondent violated the Act like it was going out of style the allegation that this promise of a $500 bonus was made is too preposterous for me to believe it occurred. I credit Corwin's denial.

Jason Adkins testified that Assistant Manager Brian Weatherly asked him on a number of occasions how Adkins was going to vote. Weatherly denied this. He apparently kept asking because Adkins would not tell him how he was going to vote. I credit Adkins over Weatherly on this point. Weatherly impressed me as an intelligent person. Respondent is of the opinion that Weatherly, in spite of his job as assistant manager, should be a unit employee. It would seem natural for Weatherly to inquire as to Adkins' union sympathies. However, because I find that Weatherly was a supervisor I must conclude that his interrogation of Adkins was unlawful and in violation of Section 8(a)(1) of the Act. In addition, Weatherly on one occasion told Adkins approximately 1 month before the election that if the Union got in store closings and loss of jobs may occur. These are threats in violation of Section 8(a)(1) of the Act.

It is also alleged that Adkins' hours of work were reduced 2 weeks before the election and that he was assigned more onerous working conditions as well in violation of Section 8(a)(3) of the Act. The record reflects, however, that Adkins had an operation on his foot and was out of work for 2 weeks. When he returned his hours of work were the same basically as what they had been or the same as the other baggers. Business records introduced into evidence (R. Exhs. 121 and 122) reflect that Adkins' hours were not reduced or at least not reduced more than the other baggers' hours were reduced.

The more onerous working conditions were not more onerous as a matter of law. Adkins and the other baggers were required to clean the ceiling and walls in the bathroom and to bag ice. These are jobs that must be done. They are not demeaning and there is insufficient credible evidence to suggest that Adkins was singled out to do these jobs and others were not.

Adkins resigned in April 1991. In his letter of resignation (G.C. Exh. 55) he thanked Store Manager L. J. Davis for letting him return to work after his foot surgery and for giving him his first experience in the working world. The letter of resignation does not read like it was written by a disgruntled person whose hours of work were unfairly reduced or whose last days on the job were more onerous than what they had been earlier his employment.

The only troublesome aspect to Adkins' resignation is that on Adkins' change of status form it is noted that he is not eligible for rehire. Comanager Cheryl Perras put that on the form on Store Manager L. J. Davis' orders and he didn't tell her why. There is no policy of not rehiring employees who quit. No explanation was furnished as to why Adkins should be ineligible for rehire.

### e. *Unfair labor practices by Comanager Cheryl Perras*

Employee Evelyn Keyes worked for Be-Lo from December 1990 to late March 1991. She was fired after the election because she violated a store policy prohibiting cashiers from buying lottery tickets from their own register. A charge was

filed over her discharge but dismissed by the Region which nonetheless called her as a witness regarding alleged unfair labor practices by Cheryl Perras.

Although Keyes may have a motive to fabricate based on her discharge I nevertheless believe her testimony based, in part, on her demeanor on the stand.

She credibly testified that Comanager Cheryl Perras met with her shortly before the election. Keyes had worn union insignia to work and was known as a union supporter. Perras showed Keyes some documents regarding the union campaign and after Keyes read the documents Perras asked Keyes what she (Keyes) thought about the Union. Perras went on to tell Keyes that if the Union got in and wages were raised some stores might close and people lose their jobs or hours would be cut. In other words Perras unlawfully interrogated Keyes and threatened store closure, loss of jobs, and reduced hours for employees if the Union was selected all in violation of Section 8(a)(1) of the Act.

Perras, who is still with Be-Lo, concedes she met with Keyes but denies the interrogation and the threats. I observed Keyes and Perras. I believe Keyes.

### 3. Store 62, Chesapeake, Virginia

Employee Durenda Adkison testified that in July 1990 fairly early in the union organizing campaign she was approached by a union organizer in front of store 62 in a position where Store Manager Morris Schwartz could observe her.

When she entered the store she testified that Schwartz asked her if she had signed a union authorization card. She also testified that thereafter on four or five other occasions Schwartz asked her if she had signed a card or was going to vote for the Union.

In February 1991, Adkison, a cashier, was fired by Schwartz for several cash shortages and overages, i.e., money in her till on a number of occasions was either a little more or a little less than it should have been. Considering all six occasions over 6 months the total difference was about $30 down from what it should have been. A charge was filed over Adkison's discharge but it was dismissed by the Region.

Adkison may not be a world class cashier but she is not a liar. I saw her and believe her testimony. She may have a grudge against Be-Lo but I find she told the truth. Schwartz is intelligent and knows full well Be-Lo's fierce opposition to the Union.

Schwartz violated Section 8(a)(1) of the Act when he unlawfully interrogated Adkison on five occasions during the organizing campaign.

### 4. Store 73, Norfolk, Virginia

Gloria Brown worked for Be-Lo at store 73, which was one of the Harrell and Harrell stores, from September 1990 until she quit on May 1, 1991.

She impressed me as an honest woman. She testified that Bert Harrell, the son of James Harrell, who is the president and chief executive officer of Harrell and Harrell and a member of the board of directors of the so-called corporate Be-Lo stores, told her, when he showed her and some other employees the Rex Corwin video, that if the Union was selected that Be-Lo would probably close like A&P, Colonial, and Big Star closed. This took place in March 1991 before the March 21, 1991 election.

Bert Harrell is a district manager for Be-Lo. He is a young man. He vigorously denied the statements attributed to him by Gloria Brown. He claims further that whenever he was asked why A&P, Colonial, or Big Star closed he would answer that they closed because they were not competitive. I credit Gloria Brown.

Gloria Weisgerber was present when Bert Harrell showed Gloria Brown and her the Rex Corwin video and she was present after the video was shown. She claims Bert Harrell did not say what Brown claims he said. I discount Weisgerber's testimony on several grounds: she had little or no recollection of the contents of the Rex Corwin video, indicating her ability to recall may not be the best; she is a long time employee (18 years) and is an assistant head cashier, and she struck me as intelligent enough to be intimately aware that it would be in her employer's interest for her not to remember what she heard Bert Harrell tell Brown in March 1991.

Having credited Brown I find that Bert Harrell threatened store closure if the Union was selected in violation of Section 8(a)(1) of the Act.

Brown also testified that at the dinner meeting which she attended shortly before the election President Rex Corwin promised a new performance evaluation system for employees and pay raises if the Union was not selected.

Rex Corwin testified credibly that a new performance evaluation system had been on the drawing boards for many months prior to the dinner meetings and he would be announcing the new system at that time whether a union organizing campaign was going on or not. Hence I conclude his announcement of a new performance evaluation system did not violate Section 8(a)(1) of the Act.

With respect to pay raises it is an uncontested fact that effective April 1, 1991, pursuant to Federal law, the minimum wage was going up from $3.80 per hour to $4.25 per hour. Because of the change in the minimum wage Be-Lo, according to Rex Corwin, had to obviously increase in pay all those employees making less than the new minimum wage and, for obvious reason of morale and elementary fairness, had to raise the pay of other employees whose pay was only slightly above the new minimum wage. Be-Lo chose to announce this new pay system in March 1991. Since the new minimum wage was going to go into effect on April 1, 1991, a mere 11 days after the March 21, 1991 election, it was not a violation of Section 8(a)(1) to announce the new pay scales at the dinner meetings since they would have been announced at this time even if Be-Lo was not the target of a union organizing campaign.

### 5. Store 96, Virginia Beach, Virginia

Store 96 is also one of the four Harrell and Harrell stores.

#### a. *Discharge of Sharon Hamrysky*

Sharon Hamrysky, a young woman, was a part-time deli clerk who began her employment with Be-Lo in August 1990. She testified that Store Manager Bobby Harrell Jr. told her on a number of occasions during her employment not to sign a union authorization card because Be-Lo didn't need a union.

On January 24, 1991, Sharon Hamrysky was discharged.

Sharon Hamrysky was discharged, according to Be-Lo, for improper discounting of food. According to Be-Lo the policy of discounting of deli food was as follows: there is no discounting permitted without specific approval of management and deli product generally is either repackaged and sold in a different mode or it is thrown out. Hamrysky testified that Store Manager Bobby Harrell Jr. gave her authority to use her discretion in discounting food. He denies it. I believe him and not her.

Suffice it to say deli food is prepared at 7 a.m. On the day in question, i.e., January 24, 1991, Hamrysky sold discounted food to several customers who were employees of the city, at least some of whom were her friends. These city workers shopped regularly at Be-Lo for their lunch and were employed by the city to do landscaping and lawn maintenance work. One of the city workers was a former Be-Lo employee.

Hamrysky sold the discounted food to the city workers at approximately 10 or 10:30 in the morning. In other words, the discounted food had not been sitting out all day but rather had been sitting out for just a few hours.

The discounting was discovered by the produce manager at store 96, Mary Doyle. Doyle, who at one time had been a store manager for Winn-Dixie and later an assistant manager for Be-Lo, which position she gave up because of her son's cancer death, was a very impressive witness. I believe her testimony based, in large part, on her demeanor.

Doyle was helping to bag groceries that morning and observed the discounting which occurred at a cash register near where she was bagging. She initially thought there may have been a mistake caused by a faulty pricing machine in deli rather than a deliberate discounting of products. Suffice it to say a dinner, which should have been at least $2.49 was priced at $1.10, a piece of steak was priced at 28 cents, which should have been $1, two pieces of steak together were priced at 57 cents and should have been $2, a large container of stir fry was priced at 69 cents and should have been more. She brought this discounting to the attention of Store Manager Bobby Harrell Jr., who determined that the discounting was deliberate on Hamrysky's part and not caused by a malfunctioning pricing device used by the deli clerk to weigh and price items. Harrell fired Hamrysky for discounting product for her friends in violation of store policy. She was only a 5-month veteran when discharged.

Several days before she was fired Hamrysky claims that Bobby Harrell Jr. had tried to kiss her and she rebuffed his efforts and also refused to go out on a date with him. Many months after she was fired she briefly pursued but then abandoned a sexual harassment claim based on these claims. Bobby Harrell Jr. was never asked about these allegations when he testified.

In judging credibility it is sometimes the case considering the reasonableness or unreasonableness of the testimony, the motive or lack of it to fabricate, etc., to credit part of a witness' testimony but not other parts. I credit Hamrysky when she testified that Store Manager Bobby Harrell Jr. told her Be-Lo didn't need a union and that she should not sign a union authorization card. It is not the place of the store manager to direct employees *not* to sign authorization cards. It is something that objectively would tend to interfere with the employee's free choice. Accordingly, Harrell's repeated statements to her violated Section 8(a)(1) of the Act.

With respect to the discounting I make certain findings: Hamrysky was not authorized to discount deli items, she did discount items which she sold to the city workers who were her friends under circumstances that would warrant that she be disciplined, and when initially confronted with the charge of discounting she denied she had discounted while in her testimony before me she claims she had authority to discount and did so.

There is little evidence in the record regarding Hamrysky's prounion position prior to her discharge. She did sign an authorization card in October 1990. Although she claims that when Bobby Harrell fired her he told her that he had heard that she had union organizers in her house. I find he did not say this.

Applying the *Wright Line*, supra, analysis I conclude that Be-Lo had grounds for discharging Sharon Hamrysky and she would have been discharged even if there was no union organizing campaign under way. Accordingly, Be-Lo did not violate the Act when it discharged Sharon Hamrysky. Again, Sharon Hamrysky's prounion activity was minimal. She may have been observed talking to a union organizer outside the store but this does not make a strong union supporter. She signed an authorization card and got a fellow employee to sign one but there is no credible evidence that Be-Lo management was aware of this. Sharon Hamrysky's card will not be counted in determining whether or not the Union enjoyed majority support.

b. *Testimony of Deborah Moser*

Deborah Moser was a most interesting witness. She worked for Be-Lo in store 96 from January 1991 until June 1991, when she quit and went to work on the picket line for the Union. She was paid by the Union for picket line duty. Four weeks prior to testifying before me she was rehired by store 96 and was working as a Be-Lo employee when she testified before me.

She had given an affidavit to the Board between the time she left Be-Lo in June 1991 and her return. In her affidavit, which is substantive evidence pursuant to FRE 801(d)(1), Moser swore that in March 1991 she was speaking with Store Manager Bobby Harrell Jr. and he promised her a raise if Be-Lo won the election. At the hearing before me she testified that she lied in her affidavit and that Bobby Harrell Jr. did not say anything about the election but merely told her that her pay would go up when she moved from the deli to the meat department.

In her affidavit Moser also swore that she had spoken with Bobby Harrell Sr., a district manager for Be-Lo, after he showed her the Rex Corwin video, and Bobby Harrell Sr. said that if Be-Lo lost the election the employees would more than likely lose their jobs because Be-Lo would go under. At the hearing before me Moser claimed that Bobby Harrell Sr. said that if the Union came in, that wages would probably go up higher, and there was chance that the store would close.

It is clear that what Moser claimed in her affidavit Bobby Harrell Sr. and Bobby Harrell Jr. said would constitute violations of Section 8(a)(1) of the Act, i.e., an unlawful promise in the case of Harrell Jr. and an unlawful threat in the case of Harrell Sr. Moser testified before me that she knowingly lied in her affidavit and told the truth before me. I see it just the opposite. In reward for getting her job back several

weeks prior to her testimony before me she was willing to testify that key elements of her affidavit were lies. I do not suggest that counsel put this in Moser's mind. Indeed, I am absolutely convinced they did not. Moser decided on this ''reward'' on her own.

Moser's testimony before me is not true but her affidavit is true. Based on my observation of the witness I'm convinced her affidavit is accurate and not her sworn testimony before me. Accordingly, Section 8(a)(1) of the Act was violated by the unlawful promise of Bobby Harrell Jr. and the unlawful threat of Bobby Harrell Sr.

Bobby Harrell Jr. claims he did say to Moser that her pay would go up when she went from the deli to meat department but he never said anything about the election and, indeed, he said this to Moser after the election. I don't believe him.

Bobby Harrell Sr. claims that he never showed the Rex Corwin video to anyone but did speak one on one with Moser before the election at her request. She asked him what would happen if the Union won the election regarding pay raises, stores closures, etc. He claims he told her that anything could happen but that *this* store would *not* close. Apparently, according to Bobby Harrell Sr., himself, even when Moser asked what would happen if the Union got in with respect to a variety of subjects such as store closures he merely stated anything can happen but store 96 (1 of 30 stores) won't close. Not much consolation. I find the statements attributed by Moser to the Harrells in her affidavit were accurate.

### 6. Store 102, Norfolk, Virginia

Jamie Wischmann worked for Be-Lo at store 102 from August 1990 until she was constructively discharged on April 6, 1991. She is now married and her new name is Jamie Wischmann Cottrell. She was a meatwrapper at store 102.

In January 1991 Cottrell was approached by Union Organizer Karen Gompers and shortly thereafter the comanager of store 102, David Rodriguez, told Cottrell he had seen her with the union organizer. This statement by Rodriguez to Cottrell creates the impression that Cottrell's union activity was under surveillance and being monitored by management in violation of Section 8(a)(1) of the Act. Rodriguez never specifically denied this took place.

In February 1991 Cottrell had to go on emergency sick leave for 6 to 8 weeks because she had to have a hysterectomy. Terry Hill, a district manager, told Cottrell that if Be-Lo needed help when she was able to return to work she would get her job back. Otherwise, too bad!

Cottrell returned to store 102 prior to the election and was told by Store Manager Paul Weithers to come back when she had a complete doctor's release. Weithers went on to talk about the upcoming election and told Cottrell that if the Union got in then Be-Lo will close and everyone will lose their job. He went on to say that if she voted no it would look better for her. I credit Cottrell. She was an impressive witness. With respect to any conflict of testimony between Cottrell and Weithers I credit Cottrell. I find Weithers' statements to her violate Section 8(a)(1) of the Act because they are unlawful threats.

Cottrell's immediate boss had been Meat Manager Dick Powers. Powers spoke with Cottrell prior to the election as well and told her that the Union couldn't help Be-Lo and if the Union got in stores would close and employees lose their jobs. I credit Cottrell that Powers said this and, accordingly, Section 8(a)(1) of the Act was violated. In so far as there are any conflict in testimony between Cottrell and Powers, who is no longer with Be-Lo, I credit Cottrell. Interestingly enough Powers, on cross-examination, conceded that Cottrell was honest.

On March 10, 1991, the Union circulated a flyer (G.C. Exh. 5) which contained a photograph of Jamie Wischmann Cottrell and told her story. The flyer recounted that she had major surgery and went on sick leave with no guarantee that her job would be there when she returned, that she couldn't afford Be-Lo's health insurance premiums and owed the hospital over $10,000, that she was out of money and couldn't pay rent, etc., and Be-Lo would not even cash a check sent to her from her family, and lastly, when she went to work (an apparent reference to Weithers and Powers) to see about returning she was urged to vote against the Union. The flyer strongly urged employees to vote for the Union in the upcoming election. It was a powerful piece of union propaganda and everything in it was true even the part about Be-Lo refusing to cash a check Cottrell got from her mother because Be-Lo said it was drawn on an out-of-state bank.

Prior to the election Cottrell made a tour of several stores with union organizers. She was treated poorly at stores 46 and 47. At both stores when she went to purchase some items she was threatened with arrest if she didn't leave the store. She was wearing a union jacket on both occasions.

After the election where she served as a union observer Cottrell returned with a doctor's release to store 102. It was April 6, 1991. District Manager Terry Hill banged his fist and was very angry that Cottrell wanted to return to work since the Union had lost the election. Hill told Cottrell that she had been wrong. Hill told Cottrell he could not fire her but would put her into store 67, an antiunion store where only 18 of 56 employees signed authorization cards (see part IV, below). Hill told Cottrell that ''he would be on her like fly on shit'' and would watch her every move and would get rid of her at the first opportunity. Hill was loud and angry when he told this to Cottrell. Cottrell never reported for work at store 67. It is clear, considering all the circumstances, that Be-Lo, through District Manager Hill, constructively discharged Jamie Wischmann Cottrell and did so in violation of Section 8(a)(3) of the Act.

Subsequent to her constructive discharge Cottrell worked for the Union on picket line duty and was compensated. She moved to Indiana in the beginning of 1992, and when she testified before me she was an employee of the Indianapolis Zoo.

Terry Hill did not testify. However, Paul Weithers, the store manager, who was present when Hill constructively discharged Cottrell did testify. Weithers is still with Be-Lo and is now store manager of store 3, which opened some months after the union election. Weithers was present when Hill offered a job to Cottrell at store 67, which Weithers acknowledged was a 30-minute drive from store 102. He claims that Hill never abused Cottrell. I don't believe him. I saw Cottrell. I saw Weithers. I believe Cottrell.

7. Store 107, Suffolk, Virginia

Robert Carpenter Jr. began his employment with Be-Lo in 1989. He was fired for theft but he denies that he stole anything. Anthony Saunders was still working for Be-Lo when he testified before me. He was a 4-year Be-Lo veteran.

Carpenter and Saunders credibly testified that after showing the Rex Corwin video to them Store Manager Milton Parker told them that Rex Corwin says that if the Union gets in the stores or half of the stores will close. Milton Parker denies he said that and claims he only told the employees that he didn't know if the stores would close or not. Jeff Pope, a former Be-Lo employee, who was present when Parker showed the Rex Corwin video to Carpenter and Saunders doesn't remember Parker saying anything about store closings other than Parker saying, in response to a question by Saunders, that he didn't know if the stores would close or not.

I credit Carpenter and Saunders based in part on their demeanor and I find that Be-Lo, through Store Manager Milton Parker, threatened store closures shortly before the election in violation of Section 8(a)(1) of the Act.

8. Store 110, Virginia Beach, Virginia

Shirley Terry began her employment with Be-Lo in 1986. She was very prounion during the union organizing campaign and this was well known by virtue of a union flyer (G.C. Exh. 29) distributed in January 1991 during the campaign. This flyer featured the photos of 14 employees and comments by them about the Union and the upcoming election. Photos of other discriminatees were also in this flyer, i.e., Sabrina Frazier (fired at store 235) and Coleen Hitt (fired at store 122). The comments from Terry on the flyer urging Be-Lo employees to support the Union were as follows:

> I've always been for unions. They help the workers. They help establish rules and procedures so that people get treated fairly: fair wages and benefits, no favoritism, making seniority count for something. Managers at Be-Lo say they'll try to do something but then say ''I can't guarantee anything.'' With the union, you do get guarantees.

Terry's name appeared on at least one other flyer distributed by the Union prior to the election urging employees to vote in favor of the Union. After the election Terry picketed the Union during her off hours always in front of a Be-Lo store. Terry was fired on May 6, 1991. She was extraordinarily well known by Be-Lo management as prounion. At the time of her discharge she was a deli-bakery manager, a unit position, at store 110.

Shortly before the election in March 1991, Terry had a conversation with Tommy Tisdale, a deli merchandiser and an admitted supervisor, who told Terry that if the Union got in stores would close, people would be laid off, and the deli section in particular might close. These are threats in violation of Section 8(a)(1) of the Act.

Prior the first union flyer referred to above (G.C. Exh. 29) being distributed Tisdale's inspection of Terry's work area was within the bounds of normal but after the flyer came out his inspection became extraordinarily thorough as if he was trying to find a problem and get Terry in trouble. He also took to conducting his inspections after Terry's day off when the chances of finding something wrong were increased. One week after the flyer came out he gave Terry written discipline for poor work performance and for drinking and smoking in the bakery.

Shortly after the election she was written up for wearing union insignia by District Manager Terry Hill. She received additional written discipline from Tisdale in late April 1991, for poor work performance and for wearing union insignia (pins) at work.

Suffice it to say Terry's very credible testimony showed that she was being harassed because of her prounion posture which included the wearing of union insignia which insignia, I note, did not reflect anything negative about Be-Lo.

On May 6, 1991, Terry was fired for improper discounting of lunch and giving away old food.

Suffice it to say employee Mark Gardner had placed some steaks in the deli cooler for later purchase by him rather than leaving them in the meat cooler as he should have done. Prior to paying for the steaks Gardner, who owned a dog, received from Terry, whose daughter he dated, some scraps of food for his dog. Terry put the scraps of food, which she was going to throw out, into a deli tray and marked the tray no charge.

When Gardner went to the cash register to pay for the steaks he took the deli tray with him. The cashier on duty, Vanessa McClendon, rang up the steaks at a substantially reduced amount, i.e., there were five steaks and only one was rung up at the regular price, two steaks were rung up at a reduced amount and two steaks were not rung up at all.

Tisdale, a deli merchandiser, and David Burchette, the store manager, were ''following'' the steaks since they shouldn't have been in the deli cooler and having seen them there wanted to know what happened to the steaks. Gary Barnette, chief of security, was called in to conduct an investigation and he arrived at the store on Monday, May 6, 1991, which was several days after the purchase. He determined that cashier McClendon had rung up the steaks for Gardner at less than what they should have been rung up for.

Barnette had never seen the contents of the deli tray and based on his interview of McClendon and Gardner, both of whom were fired, all he knew was that scraps of deli food, which were to be thrown out, were instead given by Terry to Gardner for his dog. Terry's mistake was, it appears, giving away garbage.

Unfortunately for Terry Barnette interviewed Terry at length and Terry admitted that she had given discounts at the store in the past to employees when asked about it by Barnette. In her statement to Barnette Terry said she started giving discounts with the approval of the prior store manager, who Barnette never tried to interview. In addition while he talked to others in Store 110 about discounting he did not interrogate them with a tape recorder going and in his closed car as he did with Terry.

At the time Barnette decided to take a full interview of Terry he was well aware, by his own admission, of Terry's prounion position and was, in my judgment, out to get Terry.

There is no question that Terry did wrong and subjected herself to discipline. The questions under *Wright Line*, supra, is whether or not Be-Lo would have fired Terry even if they were unaware of her prounion status. Terry was a 5-year Be-

Lo veteran. Discipline short of discharge, the capital punishment of the workplace, was never considered.

The bottom line is that Terry, a very active union supporter, was discharged because she gave away some garbage and because she was tricked into admitting she gave discounts.

Considering all the circumstances I find that Be-Lo's discharge of Shirley Terry was a violation of Section 8(a)(3) of the Act.

### 9. Store 121, Suffolk, Virginia

Employee Robert Carpenter Jr. and Anthony Saunders testified regarding unfair labor practices at store 107, Suffolk, Virginia, which was discussed above in part II, 7. Carpenter and Saunders worked at both store 107 and store 121. Most of their time was spent at store 121.

In mid-March 1991, shortly before the election, Carpenter had a conversation with John Bullock, a district manager. Bullock told Carpenter that if he (Carpenter) voted for the Union he would be on Bullock's list. Carpenter not unreasonably understood this to mean he would be fired.

John Bullock, who is still a district manager, denies he even said this to Carpenter. I credit Carpenter. I saw the witnesses and I believe Carpenter and I don't believe Bullock's denial. If Carpenter, who was later fired, wanted to gild the lilly he could have attributed more ominous threats to more supervisors and managers than he did. I believe he told the truth.

Bullock's statement to Carpenter was a threat in violation of Section 8(a)(1) of the Act.

Anthony Saunders testified that sometime in early 1991 that Meat Manager Tim Berklew, in the presence of employee John Godwin, asked Saunders what the Union could do for him. Before Saunders could answer Berklew said that if the Union got in someone like Saunders who split his time between two stores could lose benefits because the split could mean a person like Saunders could wind up loosing their full-time status and loose benefits dependent on that status.

Saunders was still a Be-Lo employee when he testified before me. I found him credible. Neither Tim Berklew nor John Godwin testified. Berklew's statements to Saunders were a threat in violation of Section 8(a)(1) of the Act.

### 10. Store 122, Suffolk, Virginia

Coleen Hitt was a very active union supporter. She began her employment with Be-Lo in November 1988 and was fired on October 19, 1991.

Hitt signed a union authorization card, wore union insignia around work, served as a union observer at the election, and her photo and comments attributed to her were featured in a union flyer distributed in January 1991. (G.C. Exh. 29.) Below her photo in the flyer was the following statement:

> Be-Lo doesn't treat its employees right and the only way to deal with it is to go with Local 400. Everyone knows people work overtime and aren't paid. There's no voice at all in scheduling. With a union contract you can get a voice.

Discriminatees Shirley Terry (store 110) and Sabrina Frazier (store 235) were also featured in this flyer.

There can be no doubt but that Be-Lo management was exceedingly well aware of Hitt's prounion posture.

On March 12, 1991, Hitt was shown the Rex Corwin video and afterwards Comanager David Griffey told her that if the Union got in more stores would close and there could be layoffs. These statements are threats in violation of Section 8(a)(1) of the Act. I don't credit Griffey's testimony that he said nothing at all to Hitt because when he showed her the Rex Corwin video he knew she was very prounion.

After the election Hitt walked the picket line in front of store 122. She was visible on the picket line and was seen by the store manager and store comanager.

In May 1991 Store Manager Mike Mainello told Hitt that she was not allowed to wear a union jacket when she was working in and out of the freezer. She was wearing it because she was cold. He told her to take it off or punch out. She left. The next day she was told to wear a smock over the union jacket or take the jacket off. She refused to take off the union jacket or wear a smock over it. Police were called by management. She left the store.

Employees were permitted to wear other types of jackets at store 122 without problems. Be-Lo disparately enforced a rule prohibiting union jackets while permitting employees to wear jackets with words or symbols on it that were not union connected. This is a violation of Section 8(a)(1) of the Act.

Hitt had not been disciplined prior to her involvement as a prounion activist. Thereafter she received a number of counseling reports and was guilty of being ''over or under'' at her register.

Hitt had a number of ''over or unders,'' that is, a disparity between what was in her till in cash and checks and what should have been in her till. Sometimes the amount in the till was too high (the customers' loss) or too low (the store's loss). There were discrepancies on July 31, 1990, February 25, March 16, 19, and 30, and May 27, 1991. Store Manager Mike Mainello could have fired her but checked with Mike Dunn at headquarters who told Mainello not to fire her. On October 16, 1991, Hitt had a ''shortage'' and on October 17, 1991, Hitt was ''over.'' Hitt thought her cash drawer had been tampered with but there is no persuasive evidence of this. When cashiers went on break they put their cash drawer in a bag and stapled the bag and left the stapled bag with the cash drawer in it in the front office to which the manager, comanager, head cashier, and service manager had access. On October 16 and 17, 1991, Hitt left the bag with her cash drawer in it unstapled because there were no staples handy at the time she went on break.

Suffice it to say Hitt was fired for being ''over'' or ''short'' too often. As demonstrated by Mainello's testimony it is management's prerogative whether or not to discharge an individual. Be-Lo policy would permit but does not mandate discharge after the number of ''over'' and ''unders'' that Hitt had on her record. Dunn told Mainello not to fire her. In addition, Manual Saunders, the owner of three privately owned Be-Lo stores and a member of the board of directors for the so-called Be-Lo corporate stores, testified, and he ought to know what he was talking about, that management could decide to retain an employee regardless of what they have done.

Was Hitt, this most active of union supporter, fired because of excessive ''over and unders'' or because of her union activity. Having heard hundreds of witnesses over 57

days of testimony there is no doubt in my mind that Hitt was fired because of her union activity and this veteran middle-aged employee would not have been discharged but for that reason. Her discharge was in violation of Section 8(a)(3) of the Act.

11. Store 126, Portsmouth, Virginia

On February 17, 1991, a little more than 1 month before the election, a meeting of employees was held at store 126. The meeting was presided over by Store Manager Curtis Whidbee. Comanager Nancy Sells and Assistant Manager Lewis Moon were also present.

Employee La Vonne Billups secretly recorded what was said at that meeting. Whidbee said at the meeting the following: ''Inside the store is my concern. Union buttons, can't wear them in the store. Union coats, can not wear them in the store, not working for Be-Lo.''

Employee Angela Cox asked, ''What about if you are off-the-clock?'' Whidbee answered, ''You cannot wear them in the store working for Be-Lo.''

Whidbee went on to make it crystal clear that if you were on the Be-Lo payroll you couldn't wear a union jacket or union pins in the store even if you were in the store just to shop. Whidbee said later on in the meeting ''ladies and gentlemen, one-thing direct, you cannot wear Union material and work for Be-Lo; that's the bottom line.'' Cox asked, ''What about discussion of the Union?'' Whidbee answered, ''Not in Be-Lo. Outside of Be-Lo, do what you want to do.'' Cox asked, ''On or off the clock?'' and Whidbee said, ''On or off the clock, not in Be-Lo. You understand that? That will be enforced.'' See General Counsel's Exhibit 28 (a transcript of the tape recording made by employee La Vonne Billups).

These prohibitions regarding wearing union material and limiting discussion of the Union among employees even when they are on breaktime are violations of Section 8(a)(1) of the Act.

a. *Discharge of La Vonne Billups*

Billups signed a union authorization card and even solicited others in the store to sign cards and was so observed by Assistant Manager Lewis Moon. She was openly prounion and often wore a union jacket.

She did not report for work on February 4, 1991, and was suspended for 1 week. She honestly thought she was supposed to be off that day but Respondent thought she was supposed to work. I do not find her suspension to be an unfair labor practice.

On February 7, 1991, she came to the store wearing a union jacket accompanied by Union Organizer Juanita Fridley to complain about her lack of work and what she thought were reduced hours.

Whidbee told her to take off the union jacket. She refused. Whidbee told Billups after Fridley said she should be able to wear the union jacket that she would get no hours if she hung around with Union Organizer Fridley. This is a threat in violation of Section 8(a)(1) of the Act. Her hours were reduced from what she had been working. This is a violation of Section 8(a)(1) of the Act.

On March 9, 1991, Billups was fired for an incident that occurred on March 6, 1991. On March 6, 1991, Billups was wearing a union jacket and was standing outside the store on her own time talking to the store security guard. Assistant Manager Lewis Moon told her to leave. She refused.

She was fired on March 9, 1991, for insubordination in refusing to obey an order from Lewis Moon on March 6, 1991, to leave the area. This tends to prove the supervisory status of assistant managers and in particular the supervisory status of Lewis Moon.

Billups was fired because she was wearing a union jacket on her own time outside the store. Her discharge was a violation of Section 8(a)(3) of the Act. Accordingly, Billups' card should be counted in determining whether or not the Union enjoyed majority status at the time of the election.

b. *Discharge of Angela Cox*

Angela Cox signed a union authorization card and wore union insignia. In February 1991 Cox spoke with Assistant Manager Lewis Moon about the Union. Moon told her that if the Union wins stores would close. Also, in February 1991 Comanager Nancy Sells asked Cox who in the store were signing union authorization cards. Cox refused to tell her. These are, respectively, an unlawful threat and unlawful interrogation in violation of Section 8(a)(1) of the Act.

On March 9, 1991, Angela Cox was fired for insubordination, i.e., earlier that day she had refused an order to take off her jacket and was ordered to leave the store. At the time of the order Cox was off the clock and was merely a customer in the store. She was scheduled to work later that day. The discharge of Angela Cox was a violation of Section 8(a)(3) of the Act. Accordingly, Cox's card should be counted in determining whether or not the Union enjoyed majority status at the time of the election.

c. *Discharge of Kim Howell*

Kim Howell signed a union authorization card, wore union insignia and a union jacket, and was openly prounion.

On March 11, 1991, Howell came into the store to shop and to handbill with Lavonne Billups and Angela Cox, both of whom had been fired 2 days before. All three women were wearing union jackets.

On March 13, 1991, when Howell reported for work she was told she was fired for insubordination for wearing union jackets in the store with Billups and Cox 2 days earlier.

After her discharge when she returned to shop in the store she was told by Store Manager Whidbee that she would be arrested if she came into the store wearing a union jacket.

The discharge of Kim Howell was a violation of Section 8(a)(3) of the Act. Accordingly, Kim Howell's card will be counted in determining whether the union enjoyed majority support at the time of the election.

Billups, Cox, and Howell were conceded by Store Manager Curtis Whidbee to be the only three employees at store 126 who wore union jackets and all three were fired. Billups, Cox, and Howell were fired for activity when they were all on their own time. Billups' activity was done outside the store. Howell and Cox handbilled in the store but were off the clock. Their handbilling did not interfere with the operation of the store. All three were fired because they were adamantly prounion and wore union jackets.

12. Store 144, Virginia Beach, Virginia

Karen Harkleroad worked at store 144. She had been a Be-Lo employee since June 1989 and voluntarily quit Be-Lo's employ in October 1991. Tom Flannery, a produce merchandiser, showed her and some other employees the Rex Corwin video in early March 1991. After the video was shown Flannery told her and the others that if the Union got in stores would close and employees lose jobs because Be-Lo would not be able to pay the wages the Union would demand. This is a threat in violation of Section 8(a)(1) of the Act. I credit Harkleroad's testimony.

Jack Scott, Be-Lo's vice president for operations, met with Harkleroad on March 16, 1991, 1 week before the election, at Be-Lo headquarters. Harkleroad had gone there on her own after hearing Scott tell her and others that Be-Lo had an open door policy. Harkleroad asked Scott why Be-Lo was so opposed to the Union. Scott told her that if the Union got in there would be less money for expansion and if wages got too high, as a result of union demands, then stores may have to close and employees lose their jobs. He went on to tell Harkleroad that he knew that she (Harkleroad) was a friend of Shirley Terry and he hoped Terry would not influence her. Terry, of course, was a very active union supporter, who worked at store 110 and who was fired in May 1991. I have found Terry's discharge to be unlawful. (See part II, 8, above). Scott's statements to Harkleroad constitute threats in violation of Section 8(a)(1) of the Act.

Both Jack Scott, who is still associated with Be-Lo, and Tom Flannery, who no longer works for Be-Lo, testified. I observed the demeanor of the witnesses and I find the testimony of Harkleroad more convincing than that part of the testimony of Scott and Flannery which is at odds with Harkleroad's testimony. Flannery did concede that he told employees that if wages went up and this caused prices to go up that marginal stores may close.

13. Store 145, Portsmouth, Virginia

Beatrice Maurer, a part-time employee, credibly testified that Scarborough White, a produce merchandiser, whose first name she thought was David but it wasn't, asked her, after she watched the Rex Corwin video, how she felt about the Union. She told White she supported the Union. White went on to tell her that part-time employees may lose their jobs if the Union got in. Maurer voluntarily left Be-Lo's employ after the election where she served as a union observer.

Scarborough White testified and denied the interrogation and threat attributed to him by Maurer. I credit Maurer. She impressed me as an honest witness. Accordingly, Be-Lo violated Section 8(a)(1) of the Act by interrogating Maurer regarding her union sympathies and threatening her by saying part-time employees like her might lose their job if the Union was selected as collective-bargaining representative.

Although employee Pat Milton corroborates Beatrice Maurer's testimony I was not impressed with Pat Milton as a witness. Milton, who was fired by Be-Lo prior to her testifying before me, claimed that Store Manager Randall Burr called her a ''nigger.'' Burr was righteously indignant in his denial. Milton is black. Burr is white. Having concluded that Milton was unreliable on that point I will not credit the rest of her testimony, nor find any unfair labor practices based on her testimony.

Kelly Riddick testified that a week or two before the election Scarborough White told her that she was not to vote for the Union because if the Union got in then prices would go up and stores might close and employees lose their jobs. This is a threat in violation of Section 8(a)(1) of the Act.

Riddick testified that one day in April 1991 she wore a union jacket in the store while working. She didn't want to take if off because she was cold. Assistant Manager Bruce Rodgers told her to cover the union jacket with other garments, i.e., smock or apron, or punch out and go home. Riddick punched out and went home. In the past Riddick had worn a Georgetown University jacket openly in the store and nothing was said. I credit Riddick's testimony. It was disparate treatment to permit jackets with words, etc., on them unless the words, etc., were favorable to the Union. This de facto 1-day suspension was a violation of Section 8(a)(3) of the Act.

14. Store 148, Norfolk, Virginia

Employee Kelly Call was very prounion. She signed an authorization card, wore union buttons and insignia, and served as a union observer at the election on March 21, 1991.

In January 1991, some 2 months before the election, Call credibly testified that Store Manager John Ames asked her how she felt about the Union. She said she would probably vote yes. Ames told her that if the Union got in then hours could be cut, employees laid off, and stores close. This amounted to unlawful interrogation and threats in violation of Section 8(a)(1) of the Act.

District Manager Tommy Winfrey spoke with Call in February 1991. Call suggested that a union might help matters at one of the other Harrell and Harrell stores and Winfrey told her that the Union could cause problems such as less hours, layoffs, and store closures. These are threats in violation of Section 8(a)(1) of the Act.

Produce merchandiser Tom Flannery in March 1991, about 1 week before the election, unlawfully interrogated Call about the election asking her what she thought about the Union and then telling her that store closure was a possibility if the Union won. This was unlawful interrogation and threats in violation of Section 8(a)(1) of the Act.

After the election Call continued as a Be-Lo employee but participated in picketing on her own time outside store 148.

Shortly after she began picketing she received a written warning about her work from Tom Flannery. Prior to picketing Flannery looked at Call's produce rack approvingly. But after Call picketed Flannery would tear apart her produce rack searching for problems. She later received a written warning from Store Manager Ames for a bad produce rack. Call credibly testified that her produce racks were good before and after being on the picket line and the warnings from Flannery and Ames were in retaliation for her protected concerted activity of picketing with others in front of the store. I agree. Accordingly, the written warnings issued to Call in the spring of 1991 after she started picketing were issued in violation of Section 8(a)(3) of the Act.

On May 13, 1991, Call went to work wearing a union T-shirt. The T-shirt was not critical of Be-Lo but merely reflected prounion sympathies, i.e., the Local 400 logo and a statement that America works best when workers vote Union yes.

Suffice it to say District Manager Tommy Winfrey told her to change the T-shirt or go home. She refused. He then told her she was ''expelled'' from the job. An interesting word which means kicked out in a school setting and would be functionally equivalent to being fired. Call left the store and went on the picket line. At the suggestion of others she went back to the store to secure some documentation for her ''expulsion.'' She met with Comanager Ken Hodges who told her she had to change clothes or leave. She asked Hodges how many times ''you could be expelled before you was fired.'' He didn't answer.

When she returned the next day she was told by the store manager that she was considered a voluntary quit.

Call credibly testified that prior to her discharge—and I find it to be a discharge—she routinely wore T-shirts with words or symbols on them advertising rock groups, for example, and had never been told she couldn't wear such a T-shirt or T-shirts in general.

The policy on T-shirts is unclear. Many months after the election a new employee handbook was published which prohibited the wearing of T-shirts. Prior to that the handbook was silent on T-shirts. Some T-shirts, of course, might contain vulgarities or other offensive material and could be banned. The record as a whole demonstrates that the first time Be-Lo began telling employees not to wear T-shirts or to cover T-shirts with a smock or apron was was not prohibited. Accordingly, the discharge of Call, under all the circumstances, was in violation of Section 8(a)(3) of the Act.

I observed Call and found her to be a very credible witness. In so far as Ames, Winfrey, Flannery, or Hodges contradict her I credit Call over them. Respondent's claim that Call voluntarily quit her job is not persuasive.

During the hearing the General Counsel moved to amend the complaint to allege that James Shoemaker, the third member of Be-Lo's litigation team, had interrogated employee Ronald Taylor about his authorization card without first giving him the appropriate warnings required by *Johnnie's Poultry*, 146 NLRB 770 (1964). Shoemaker, a young man of obvious high integrity, gave warnings to Taylor when he first met with him but when he later spoke with him on the phone he couldn't specifically say he warned him again. It was Shoemaker's habit to warn the employees but he was too honest to say he was sure he did so when he spoke on the phone with Taylor because he had no independent recollection of it. Shoemaker had initially warned Taylor and I'm sure he did again on the phone. The Act was not violated by any action of James Shoemaker.

### 15. Store 232, Newport News, Virginia

#### a. *Failure to recall Erwin Hatchett*

Erwin Hatchett began his employment with Be-Lo in September 1989. He was a meatcutter. Indeed he had been a meatcutter for over 20 years. Over the years he worked at stores 236, 234, and 232.

Hatchett was prounion. He credibly testified that he had a workmen's compensation claim because he was hurt on the job in December 1990. By early January 1991 he was able to do light work and by mid-January 1991 he was able to work with no limitation.

On January 25, 1991, Hatchett was laid off. He credibly denied that he volunteered for the layoff. The layoff was occasioned by a decline in business caused by the Persian Gulf War and the deployment of military forces in the Tidewater area of Virginia to the Persian Gulf.

Hatchett participated in picketing and handbilling at a number of Be-Lo stores beginning in April 1991. Hatchett was not recalled from layoff. As recently as December 1990 Hatchett had received a merit pay raise and, accordingly, I infer that Be-Lo thought he was competent at his job.

As the world knows the United States and its allies very quickly and very decisively accomplished its mission in the Persian Gulf and the troops were returning home by early spring 1991 and business was getting better at Be-Lo.

District Manager Chris Bush claims he did not know Hatchett's union sympathies when he laid him off in January 1991. However, it is clear that Be-Lo knew about Hatchett's protected concerted activity on the picket line beginning in April 1991 and did not recall him to work. Accordingly, Be-Lo's failure to recall Erwin Hatchett from mid-April on was a violation of Section 8(a)(3) of the Act. Since Hatchett should have had a reasonable chance of recall his card will be counted in determining whether the Union enjoyed majority support about the time of the election.

#### b. *Discharge of Gwen Andrews*

Gwen Andrews was a meatwrapper at store 232. In November 1990 William Simmons asked Andrews if she was going to the union meeting that night. Although Simmons, who did not testify, was a meat manager and meat managers would later be excluded from the unit, at the time Simmons asked Andrew this question he was himself actively prounion and thought undoubtedly he would be in the unit. His situation was not unlike that of Meat Manager Tom DeYarmon at store 37. Accordingly, I do not find this to be a violation of the Act. In fact Simmons had gone to a number of union meetings to include the one he asked Andrews about.

In February 1991 meat merchandiser Rick Kyle spoke with Andrews and told her that if the Union got in she would probably see reduced hours, layoffs, and some stores might close. He also asked if she had signed a card and she said yes. Store Manager Robert Weirick and Meat Manager William Simmons were present. These statements by Kyle constitute unlawful threats and interrogation in violation of Section 8(a)(1) of the Act.

On March 5, 1991, Andrews was fired. At that point Meat Manager William Simmons, meat merchandiser Rick Kyle, and Store Manager Robert Weirick, all knew she was prounion. It was just a little over 2 weeks before the election.

Andrews' testimony concerning her discharge on March 5, 1991, is uncontradicted. Meat Manager William Simmons never testified. On March 5, she reported to work at 9:30 a.m., as scheduled. Meat Manager Simmons asked her why she had not wrapped the beef tongue from the day before, and Andrews explained that she did not have time and had placed the unwrapped item back into the cooler consistent with past practice. Andrews observed some cornish hens on the table and began to wrap them. Simmons asked her what she was doing to which Andrews replied that she was wrapping cornish hens. Simmons said, ''I need you to price and weigh chicken legs.'' Andrews said, ''okay,'' and attempted to finish wrapping the cornish hen upon which she was working. Simmons repeated, ''Gwen I need you to price and weigh the chicken legs.'' Andrews stated that she did not

reply, but then Simmons repeated his request for a third time, whereupon, Andrews replied, ''William, I heard you the first two times that you said it.'' At that point, according to Andrews, Simmons ''ran over to [Andrews] from the cutting block to the wrapping table [and] got in my face and . . . said, 'what the hell is your problem?''' Andrews recalled that while she chuckled a little, Simmons made other remarks, which she can not recall, but she specifically recalled that Simmons then said, ''Look, you can go home.''

Andrews turned and walked away from him. Simmons said, ''Don't come back,'' which Andrews testified she understood to mean she was fired, and, therefore, she proceeded to clock out and went home. She never returned to work. Weirich never attempted to discuss the incident with Andrews, an employee who he admitted had never received any discipline.

The timing of the discharge of a known union supporter just a little over 2 weeks before the election for a mild exchange of words with her boss coupled with the fact that she was a 6-month veteran, who just the month before had voluntarily worked an ''all-nighter'' at the store, establishes that Andrews was discharged in violation of Section 8(a)(3) of the Act.

As noted above Simmons did not testify and in so far as Kyle's and Weirich's testimony contradicts that of Andrews I credit Andrews who impressed me, by her demeanor as an honest person. Kyle and Weirich are both still supervisors for Be-Lo.

16. Store 234, Hampton, Virginia

Prior to being transferred to store 232 Erwin Hatchett (see parts 11, 15, store 232, supra) worked as a meatcutter at store 234. In December 1990 Meat Manager Bob Evans spoke with him. Evans told Hatchett that he (Evans) had worked in a union store and if the Union got in stores would close just like they did at Big Star, A&P, and Colonial.

I note from Part I of this decision that part of Be-Lo's campaign propaganda was that employees should talk to former Big Star, Safeway, and A&P employees and ''listen to their horror stores.'' (C.P. Exh. 10.) One former union employee they were encouraged to talk to about his horror story was Bob Evans at store 234.

Pam Jackson worked at store 234 prior to her transfer to store 235 in February 1991. While still at store 234 in the fall of 1990 Comanager Robert Weirich—who later transferred to store 232—asked Jackson, in the presence of another employee, why she wanted a union. Jackson had been seen wearing union insignia. Weirich went on to tell her that he had been a union employee and if the Union got in that prices would go up, stores won't be competitive, and stores will eventually close. This is an unlawful threat in violation of Section 8(a)(1) of the Act.

In the winter of 1990 Comanager Delli Suitor asked her if she was going to union meetings and told her that if the Union got in stores will close because prices will go up and employees will be fired or laid off. Section 8(a)(1) of the Act was violated when Suitor unlawfully interrogated and threatened Jackson.

Employee Robert Crawford worked at night in store 234 after the store was closed. Employees had traditionally worn T-shirts with words on them at night without management saying anything. However, as soon as Crawford wore a union T-shirt Store Manager Howard Wright told him he could not wear union T-shirts even though no customers were in the store to see it and other T-shirts with writing on it were allowed. This is a violation of Section 8(a)(1) of the Act.

In February 1991 Comanager Delli Suitor spoke with Crawford and others and told them that if the Union got in there would be no slack or being late and productivity would have to improve. These are threats of more onerous working conditions in violation of Section 8(a)(1) of the Act.

In late February 1991 Store Manager Howard Wright told Crawford in the presence of fellow employee James Salisbury that if the Union got in there might be a cut back in the number of employees and stores might close. These are threats in violation of Section 8(a)(1) of the Act. Crawford, an ex-Army MP, voluntarily quit Be-Lo after the election and moved to Pittsburgh, Pennsylvania.

Employee James Salisbury, who voluntarily quit Be-Lo's employ, testified that Wright asked him if he had been approached by the Union and both Wright and Suitor in the month before the election predicted pay cuts, loss of jobs, and store closures if the Union was selected. These are unlawful interrogation and threats in violation of Section 8(a)(1) of the Act.

Employee Diane Groshong was a ''key'' worker for the Union at store 234. She wore union pins at work and was told in the fall of 1990 by Store Manager Howard Wright that she could not do so and had to take them off. Prior to this employees were permitted to wear other pins, e.g., United Way pins, music pins, etc. To prohibit just union pins and not other pins is a violation of Section 8(a)(1) of the Act. Groshong is still an employee of Be-Lo.

In so far as Bob Evans, Robert Weirich, Delli Suitor, and Howard Wright contradict Eriwn Hatchett, Pam Jackson, Robert Crawford, James Salisbury, and Diane Groshong, I credit Hatchett, Jackson, Crawford, Salisbury, and Groshong.

17. Store 235, Hampton, Virginia

a. *Discharge of Sabrina Frazier*

Sabrina Frazier was a very prounion Be-Lo employee. She began her employment with Be-Lo in November 1986 and was fired on March 6, 1991, approximately 2 weeks before the election. Frazier, like discriminatees Shirley Terry (Store 110 ) and Colleen Hitt (Store 122), who were also fired, appeared in General Counsel's Exhibit 29, which was a piece of union literature which urged Be-Lo employees to support the Union. Frazier's picture appeared in this prounion literature and contained the following language attributed to Frazier.

> Be-Lo promises things but doesn't put out. With a union contract we'd have some guarantees. Like they say they'll give you ''evaluation,'' but that doesn't mean you get a raise. They just talk. Without the union there's nothing to make them do anything they don't want to do for their own reasons. We need a union.

Frazier went to union meetings, held union meetings in her home, solicited fellow employees to sign union authorization cards, and was well known to Be-Lo management as a key union supporter.

Subsequent to the distribution of General Counsel's Exhibit 29 in early January 1991 life changed for Frazier.

Meat Manager Paul McFarland told Frazier when he learned of General Counsel Exhibit's 29 that she was digging her own grave. This is a threat in violation of Section 8(a)(1) of the Act.

Frazier was the produce manager at store 235 during the several months prior to the election. She had worked at other stores over the years. Prior to the union campaign she had not been disciplined.

Produce merchandiser Tom Flannery went after Frazier with a vengeance. He tore into her produce rack regularly in an effort to find something wrong.

On February 15, 1991, Frazier received an unusually negative produce check list. A check list was a form filled out by the produce merchandiser who covered several stores and he pointed out on the check list areas in need of improvement. Produce managers in their individual stores—like Frazier—were never asked to sign a check list. On this occasion Flannery wanted Frazier to sign the check list so he would have proof she was aware of the defects he claims he found in her produce rack. She refused to sign. She was asked again to sign the next produce check list prepared by Flannery and this time she did sign it.

On February 23, 1991, she did not attend a meeting at the store. Frazier did not think she had to attend the meeting because the note on the timeclock, a copy of which Frazier kept, was a reminder only to cashiers not to forget the February 23, 1991 meeting. The posted memo did not say that the produce manager had to be at the meeting. There is some confusion regarding the meeting. Some supervisors said there had been a prior session when Frazier had been told that she had to be at this meeting. Frazier may have made an honest error in not being at the meeting but there is credible evidence to support the position that she was supposed to be at the meeting and should have been. In light of this the written counseling report which she received for failing to attend the meeting does not violate the Act.

On March 4, 1991, the Union sent out another campaign flyer urging employees to vote for the Union in the election just weeks away. This flyer, which was mailed to all Be-Lo employees was only one page in length and it contained the photograph of only one employee, i.e., Sabrina Frazier. Under Frazier's picture the following language appeared:

> TO ALL MY CO-WORKERS:
>
> I want to introduce myself to you and ask you for your help. I am a produce manager at store #235. I believe in Local 400 and OUR RIGHT TO HAVE A UNION. Be-Lo knows how I feel about the union and is doing everything it can to make me quit my job. I work hard and try to do a good job for Be-Lo just like each of you do. The harder I work the more Be-Lo supervisors tell me what a bad job I do, just because I am a union supporter and believe we have A RIGHT TO HAVE A UNION.
>
> WE NEED:
> * BETTER WAGES
> * JOB SECURITY
> * HEALTH INSURANCE
> * A PENSION PLAN
> * BETTER WORKING CONDITIONS
> * A GRIEVANCE PROCEDURE
>
> It is unfair for Be-Lo to treat me bad just because I am standing up for OUR RIGHT TO HAVE A UNION. I am fighting for you, so please support me and yourselves. Stand up against unfair treatment. On election day please vote Union Yes! It is our only way. It is the workers way.'' [Emphasis in the original.]

The flyer was signed by Frazier.

On March 4, 1991, Frazier received another written counseling report from Store Manager Robert Nies for having a less than up to par produce rack. I find this counseling report to have been issued in violation of Section 8(a)(3) of the Act.

Frazier impressed me as a very honest person. I absolutely believe her testimony and the accuracy of her opinion when she testified that the quality of her work in setting up and maintaining an attractive produce rack was the same before the union campaign started and afterwards. Her prounion position—no employee was more openly prounion than Frazier—caused Be-Lo to go after her with a vengeance.

On March 5, 1991, Comanager Delli Suitor told Frazier that if the Union got in then stores close and people lose their jobs.

On March 6, 1991, Frazier was told she was fired by Chris Bush. Bush was a district manager for Be-Lo, i.e., he was in charge of several stores. He is no longer with Be-Lo but is still in the grocery business down in Georgia. Bush discussed Frazier when he testified and, essentially, he claimed that she was a marginal produce manager and had been demoted from manager to produce clerk in the past although without loss of pay. In addition, Bush claims he reviewed a number of produce check lists and concluded on the basis of her entire record to fire her.

Bush did not impress me as an honest witness. It is quite possible that Frazier is not a world class produce manager and maybe she should be a produce clerk at another store rather than a produce manager at store 235, which is a small store and has only one person, i.e., the produce manager, in the produce department. The timing of her discharge, approximately 2 weeks before the election, makes the discharge so suspect that no one who saw her in person and heard her testimony and viewed the union campaign literature in which she appeared could conclude that she was fired for any reason other than her protected activity in urging her fellow employees to support the Union. Her discharge was a violation of Section 8(a)(3) of the Act and her card will be counted in determining whether the Union enjoyed majority support at the time of the election.

b. *Discharge of Pamela Jackson*

Pamela Jackson began her employment with Be-Lo in September 1989. She worked at store 234 up to February 1991 when she transferred to store 235. She was a deli clerk and was discharged in May 1991. Jackson testified regarding 8(a)(1) conduct by supervisors at store 234, i.e., Store Manager Robert Weirich and Comanager Delli Suitor.

On March 9, 1991, Jackson received a performance evaluation which was very good and she was given a 25-cent-an-hour raise. (G.C. Exh. 38.)

Jackson had signed a union authorization card and she picketed with the union in front of the store when she was

off duty. In other words Be-Lo management was well aware of her prounion sympathies.

A health inspection at the store revealed some defects in cleanliness of the breakroom and Jackson was given extra duties to keep the breakroom clean. This was not a violation of the Act.

In May Jackson asked to have a Saturday off from work telling Meat Manager Paul McFarland that she had to go to Washington, D.C., to pick up her brother. Her brother had recently been shot. McFarland, Store Manager Robert Nies, and District Manager Chris Bush were unable to give Jackson the day off because the only other deli clerk at store 235, i.e., Pat Bennett, had already been given the day off to attend her daughter's wedding and Nies was unable to find a suitable deli clerk replacement for Jackson from one of the other Be-Lo stores. Jackson was told she couldn't be off that Saturday.

On Saturday Jackson claims she felt ill and sore from heavy work the day before and couldn't go to work. She didn't report to work and Be-Lo never opened its deli section that Saturday because they couldn't find someone to replace her. She had her boyfriend call the store to say she was sick.

Be-Lo would not let Jackson return to work until she got a doctor's note. Jackson claims that she did not go to see a doctor and since she goes to the clinic it is not the easiest thing in the world to get a doctor's note when you haven't seen the doctor. Be-Lo would not let her return to work without a doctor's note. She never presented a doctor's note.

Jackson's failure to report to work on Saturday may not have been the result of sickness considering the fact that she had asked for the day off and been denied permission to take it off. On the other hand would Be-Lo have conditioned her return on bringing in a doctor's note if she had not been a union supporter. I don't think so. If Jackson had claimed to have seen a doctor and couldn't produce a doctor's note that would be one thing but she never said, directly or indirectly, that she had seen a doctor. She merely said she was sick and specifically told Bush she had not seen a doctor. The only doctor's note she could possibly get from the clinic would be one from a doctor which would say that Jackson claims she was sick last Saturday. It goes without saying that many people are often too sick to work and yet don't see a doctor. If they did the cost of medical care would be even higher then it is. Jackson had received a very good work performance evaluation just 2 months before and even though she had recently received very minor discipline it is hard to believe that her picketing activity was not the reason she was fired. Be-Lo was suspicious of the real reason for Jackson's absence on that Saturday in May but Jackson had no history of becoming ''conveniently'' ill when she wanted a day off.

The discharge of Jackson, considering all the facts, was a violation of Section 8(a)(3) of the Act.

### 18. Store 236, Newport News, Virginia

#### a. *Discharge of Curtis Martin*

Curtis Martin, who was a meatcutter trainee, credibly testified that in March 1991, not long before the election, District Manager Chris Bush, in the presence of Meat Manager Gregory Wright, asked Martin if he was for the Union. Martin answered yes. This is unlawful interrogation in violation of Section 8(a)(1) of the Act. Bush denies it. I don't believe him.

Martin was always a part-time employee with Be-Lo. He had been hired in August 1990. He received 50-cent-an-hour raise in February 1991. Beginning in early January 1991 Martin's hours were reduced and then reduced further. Eventually his hours were so few he quit. His girlfriend had a baby in March 1991 and in May 1991 Martin quit Be-Lo to take other work with more hours so he could afford to get married.

It was Martin's perception that there was plenty of work to justify his getting more hours but Be-Lo management proved that business had gone down as a result of the Persian Gulf War in early 1991 due to troop development out of the Norfolk area and went down further in April 1991 at this store when the union picketing commenced. Martin was not a very active union supporter like many of the discriminatees in this case. I find the reduction in hours which prompted Martin to quit and look for work elsewhere was not a violation of Section 8(a)(3) of the Act. He was not constructively discharged because of his union activity as alleged in the complaint.

#### b. *Discharge of Darlina Bynum*

Darlina Bynum was a full-time meatwrapper. She wore a union jacket and a union T-shirt. Meat Manager Gregory Wright told her to wear a smock and cover up her union T-shirt although he never told her to wear a smock to cover up her Pepsi T-shirt. This is disparate treatment and a violation of Section 8(a)(1) of the Act. She also claims that Rex Corwin made disparaging racial statements. Bynum is black. Corwin is white. I find Corwin did not make those statements. I credit his denials. I believe Bynum simply misunderstood him. Bynum was prounion and Be-Lo management knew it.

After the election her hours of work were reduced. She was given a job at another store but it was inconvenient for her to get there. There is no question but that Bynum was a good worker. In May 1991 she quit because she had three children to raise and needed a job with more hours. Store 236 was hit hard business wise by both the Gulf War and the later union picketing. I do not find that Bynum had her hours reduced because of her prounion activity. Hence, I do not find a violation of Section 8(a)(3) of the Act.

#### c. *Testimony of Meat Manager Gregory Wright*

Gregory Wright was the first substantive witness called by the General Counsel. In the early months of the campaign Wright was prounion. Eventually the unit was clarified and meat managers were excluded. Wright testified as a hostile witness for the General Counsel. I've never seen a witness more anxious to get off the stand and go about his business than Wright. He was terrified of saying anything that would make Be-Lo management look bad since he still worked for Be-Lo and had a family. The problem was he had given an affidavit to the Board prior to his testifying which detailed a number of unfair labor practices.

Gregory Wright, who was very agitated on the stand and said he just wanted to support his wife and four children, testified that President Rex Corwin personally visited store 236 just before the election and told a group of employees that

if the Union got in the store would close and if the employees thought he was joking they should look at Big Star, Safeway, and A & P, all of which had closed. This is a threat in violation of Section 8(a)(1) of the Act.

Wright also testified that Store Manager John Stokes told him to cut the hours of Curtis Martin and Darlina Bynum after Martin and Bynum had been seen on the picket line while still Be-Lo employees. However, I find that the hours of Martin and Bynum were cut for economic reasons and not to retaliate against those two employees for their union activity. If new employees had been hired at the time their hours were reduced or, if other employees, who were not prounion, had their hours increased at the time Martin's and Bynum's hours were reduced my conclusion might well have been different.

Wright's performance on the stand, i.e., his incredible fear of Be-Lo retaliation, tells me that the effects of Be-Lo's unfair labor practices had certainly not dissipated by the time Wright testified, i.e., February 19, 1992, almost 1 year after the election.

### 19. Summary

As can be seen Be-Lo committed numerous unfair labor practices both during the period leading up to the election and after the election at 18 of the 30 stores whose employees would be in the bargaining unit.

At one point subsequent to the election Be-Lo management, to include District Manager Chris Bush, Meat Manager Paul McFarland, and meat merchandiser Rick Kyle, engaged in counter-picketing. They carried signs which proclaimed ''Local 400 means high prices and unemployment,'' ''Local 400 costs jobs,'' and ''Local 400 means unemployment.'' These signs reflect the thinking of some of Be-Lo's management and lacks the craftiness of the lawful antiunion propaganda referred to in Part I of this decision. There is no doubt in my mind about that fact that many supervisors went beyond the lawful antiunion propaganda and instructions prepared by counsel and repeatedly violated Section 8(a)(1) and (3) of the Act as detailed above.

## Part III

### A. *Access*

There are a number of access issues in this case. On April 10, 1991, some 20 days after the election, the Union began picketing at a number of Be-Lo stores. At some stores just nonemployee union organizers picketed and at others nonemployee union organizers picketed along with either employee or former employees some of whom had been discharged in violation of Section 8(a)(3) of the Act. The picketing urged customers not to shop at Be-Lo because Be-Lo engaged in unfair labor practices.

Suffice it to say Be-Lo represents that when picketers and handbillers were ordered from in front of the various stores to the public sidewalk on threat of arrest for trespassing it was because they were interfering with ingress or egress of customers and employees. The picketers and handbillers were removed between 50 to 100 feet from the front of the stores.

The General Counsel and the Union contend that the persons picketing and handbilling were not interfering with ingress or egress and were ordered under the threat of arrest for trespassing to the public sidewalk strictly and solely to interfere with lawful picketing and handbilling.

The main cases in this area of access appear to be two Supreme Court decisions, i.e., *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), and *Lechmere, Inc. v. NLRB*, 1125 S.Ct. 841 (1992); and a recent Board decision issued after *Lechmere, Inc*., i.e., *Bristol Farms*, 311 NLRB 437 (1993).

The picketing at the Be-Lo stores appears to have been effective. Respondent's Exhibit 109 reflects that in comparing 1990 (when there was no picketing) sales, with 1991 (when there was picketing) sales, that sales were down some $7 million in 1991 from 1990 sales or 1991 sales were 10.5 percent lower than in 1990. There can be no doubt that the picketing was effective in the sense that customers got the union message that they should not shop at Be-Lo because Be-Lo was unfair to labor. Obviously it would have been more effective to picket or handbill right in front of the store since you wouldn't miss any customers. Additionally, I heard from a large number of witnesses on the issue of whether or not the persons picketing interfered with ingress or egress from the stores. I conclude that the persons picketing did not interfere with customers or employees of Be-Lo entering or leaving the stores.

In the instant case the target of the picketing was customers and the Union had access in the Tidewater area to radio, television, and newspapers to get its message across to the customers of Be-Lo. Indeed, they did use the media to communicate with their audience.

The stores where picketers and handbillers were ordered to the public sidewalk often under the threat of arrest occurred at the following stores on or about the date noted:

1. Store 28, Norfolk (April 10, 1991)
2. Store 44, Norfolk (April 12, 1991)
3. Store 47, Norfolk (April 12, 1991)
4. Store 73, Norfolk (April 10, 1991)
5. Store 84, Portsmouth (June 18, 1991)
6. Store 96, Virginia Beach (April 13, 1991)
7. Store 102, Norfolk (July 31, 1991)
8. Store 109, Virginia Beach (July 15 and 25, 1991)
9. Store 122, Suffolk (May 13, 1991)
10. Store 126, Portsmouth (April 12, 1991)
11. Store 145, Portsmouth (July 10, 1991)
12. Store 148, Norfolk (April 10, 1991)
13. Store 232, Newport News (May 11, 1991)
14. Store 233, Hampton (June 24, 1991)
15. Store 234, Hampton (June 24, 1991)
16. Store 236, Newport News (May 22, 1991)

Be-Lo was either an owner or a tenant with authority from the owner to exclude trespassers when it ordered persons picketing or handbilling from the front of the Be-Lo stores and off the parking lots onto the public sidewalk. Under *Lechmere, Inc*., supra, and *Bristol Farms, Inc*., supra, it appears to be that this was not a violation of the Act unless under Virginia law an owner or someone standing in the owner's shoes with proper delegation was without authority to remove trespassers from his property under these circumstances, namely, nonviolent picketing, which was protesting alleged unfair labor practices. A good judge of Virginia law in this area of the law would be a Virginia State Court judge. Five Virginia Circuit Court judges sitting in Norfolk, Portsmouth, Virginia Beach, Newport News, and Hampton,

respectively, granted injunctive relief to Be-Lo which went to court as either the owner of the property from which they wanted to remove persons picketing or had authority delegated to them from the owners of the property to pursue the injunctive relief. If the owner could not remove peaceful picketers from trespassing, i.e., being on the property without permission, no doubt one of the courts would have said so. None did say so.

Needless to say disparate treatment would violate the Act. That is, you can't exclude peaceful union solicitation or picketing but permit other peaceful solicitation or picketing. I find that Be-Lo's policy was a very strong and broad policy which prohibited all solicitation on its property. However, some solicitation did go on. I find, however, that while some solicitation occurred and Be-Lo took very little action to stop it at some stores I don't believe they engaged in disparate treatment because the soliciting was isolated and sporadic. That activity was as follows: a person selling a cookbook inside store 102 on one occasion, the pretty constant presence of Muslims selling oils and incense in front of store 232 and occasional girl scout cookies and greetings cards being sold inside store 232, regular presence of Muslims selling oil and incense in front of store 236, an occasional Jehovah's Witness distributing the Watchtower magazine and a one-time occasion of a local Lions Club soliciting at store 148, an isolated incident of man putting a political flyer under the windshield wiper of cars in the parking lot of store 37, on a couple of occasions some followers of Lyndon LaRouche handing out literature at store 28 and store 120. The bottom line is there are 30 stores in the unit and the time covered the period from April 1991 to the close of the hearing before me in October 1992. The nonunion soliciting that went on was isolated and sporadic.

A number of witnesses testified concerning the access issue and some photographs and videotapes were received into evidence. All the witnesses, in my judgment, were basically honest. The conclusions I reach, however, indicate that a number of them from both sides exaggerated. The Union did not block ingress or egress or harass customers and the Union was effective in its picketing and handbilling even when moved to the public sidewalk.

I find that Be-Lo did not violate the Act on the occasions listed above when it caused picketers to move to the public sidewalk often under threat of being arrested for trespassing. At no time were employees of Be-Lo asked to move unless there were nonemployee union organizers present as well.

### B. *Injunction Cases*

Picketing and handbilling by the Union commenced on April 10, 1991, several weeks after the election. Be-Lo sought and obtained injunctive relief in five different Virginia jurisdictions in the Tidewater area; i.e., Norfolk, Newport News, Hampton, Portsmouth, and Virginia Beach. The injunctions were granted in April, May, June, and August 1991.

In September 1991, two complaints issued from the National Labor Relations Board alleging that Be-Lo improperly denied the Union access to property owned or leased by Be-Lo and prayed for an order requiring Be-Lo to apply to each of the state courts for dissolution of the respective injunctions. These complaints were superseded by the complaint tried before me but the access allegations were the same.

After the issuance of the complaints the Union moved in each of the state courts to dissolve the injunctions. Be-Lo actively resisted this effort by the Union. The Union incurred litigation expenses.

In December 1991 the Regional Director for Region 5 notified Be-Lo and the five state courts of the recent Board decision on November 21, 1991, in *Loehmann's Plaza*, 305 NLRB 663 (1991), which held that once a complaint issues alleging the unlawful exclusion of employees or union representatives from the employer's property, state court action concerning the same activity is preempted and the continued pursuit of such a lawsuit violates Section 8(a)(1) of the Act. The Board has applied this rule retroactively. *Great Scot, Inc*., 309 NLRB 548 (1992). Part of the remedy for this violation will be that the offending party pay all legal fees incurred by the Union as a result of the failure of the offending party to promptly stay the injunction on issuance of the complaint.

It was not until December 9, 1991, 3 months after the issuance of the first complaint on September 12, 1991, alleging the access violations that Be-Lo finally moved to stay the injunctions.

Be-Lo violated Section 8(a)(1) of the Act by maintaining and defending the injunctions between September 12, 1991, when the complaint issued and December 9, 1991, when Be-Lo stayed the injunctions.

## Part IV

### The Union Enjoyed Majority Support and a *Gissel* Bargaining Order is Appropriate

As noted above the employees of 30 Be-Lo stores made up the bargaining unit. The unit was stipulated to be as follows:

> All regularly scheduled full-time and part-time employees, including store-level produce department supervisors employed by Bonnie Be-Lo Markets, Inc., Harrell and Harrell, Inc., JL Saunders, Inc., L.C. Shelton, Inc., and Raul, Inc., doing business as Be-Lo Stores located in Tidewater, Virginia, metropolitan area, excluding store managers, store-level comanagers, store-level meat department supervisors, guards and supervisors as defined in the Act.

The supervisory status of assistant managers, head cashiers, and service managers was litigated before me. Respondent maintaining they were employees under the Act and in the unit and the General Counsel and Charging Party maintaining the opposite. Several assistant managers were alleged to be statutory supervisors for purposes of proving unfair labor practices and the supervisory status of the remaining assistant managers and the head cashiers and service managers was litigated in order to see whether they belonged in the bargaining unit or not for purposes of determining whether the Union had a card majority prior to the time of the March 21, 1991 election.

In addition, for purposes of determining who was in the unit it is necessary to decide if Michael Olds and Melvin Hagans were guards and thereby excluded.

To begin with Michael Olds and Melvin Hagans will be deleted from the unit because they were security guards dur-

ing the dispositive period of time. Olds was a full-time employee with Old Dominion Security Services and worked full time as a security guard for Be-Lo between January and April 1991 at store 48. He carried a firearm and wore a uniform. The fact that he also worked part-time as a grocery clerk for Be-Lo does not make him an eligible voter.

Between January and March 1991 Melvin Hagans was employed full time as a security guard at store 145 for Key Security. Part of the time he wore a uniform but switched to plain workclothes at some point. He originally carried a firearm but at some point lost his gun permit. He was an unarmed security guard.

Assistant managers were sometimes called the third man. The assistant managers were in charge of the store when neither the store manager nor store comanager (both of whom are stipulated to be statutory supervisors) were in the store. This amount of time varied but often was as much or more than 20 hours per week. In addition, the assistant manager, in the absence of the manager or comanager, had the authority to let an employee go home if the employee was sick and to send home an employee if the employee was intoxicated or had stolen some merchandise from the store. They effectively discharged employees for pilfering because the process was that the assistant manager sent the person home intending to fire them and the next day the manager would always fire the person. There is evidence that several assistant managers imposed discipline on employees, e.g., Ken Hodges (store 148), Jeff Riley (store 37), Brian Weatherly (store 37), Harry Sutton (store 47), and Lewis Moon (store 126). All are supervisors. However, Ken Hodges will not be deleted from the unit because he did not become an assistant manager until after the election. Accordingly, the above four assistant managers and others, to include, Christopher McCann (store 44), Jacqueline Dessoffy (store 109), and Bruce Rodgers (store 145) were ineligible to vote and should not be included in the unit when deciding whether or not the Union had majority support prior to the election.

Head cashiers, whose title was at some point changed to service managers, are not statutory supervisors and should be included in the unit in determining whether the Union had majority support prior to the election. The head cashier or service manager's actions in telling a cashier to open up their cash register because the store was busy was a direction of work by another employee that was routine in nature and did not require the exercise of that level of independent judgment necessary to make a person a statutory supervisor. Head cashiers and service managers also filled out ''over and under'' reports which likewise did not require the exercise of independent judgment but merely requires calculating whether the cashier's till had more or less cash and checks in it than the tapes indicated it should. The head cashier or service manager merely makes an ''over and under'' report, one even gave herself one. Whether there would be discipline imposed or not as a result of being over or short was the decision of someone else. The head cashier or service manager recorded ''over and under'' like the timeclock recorded tardiness.

General Counsel's Exhibit 63 is the voter eligibility list. The exhibit contains a list of all the eligible voters for the March 21, 1991 election by store. The best way to organize the exhibit is to put it in the following order, i.e., the list of employees at store 28, followed by the list of employees at store 37, and ending with the list of employees at store 236. See list of stores by number and location in Part I, above.

General Counsel's Exhibit 63 contains the names of 756 eligible voters. Union authorization cards are in evidence from 403 of those individuals. A clear majority of some 53.3 percent of unit employees manifested support for the Union. But during the union organizing campaign the Union secured many more authorization cards than 403. There was employee turnover in the stores and the 756 figure from General Counsel's Exhibit 63 is the number we will use in deciding if the Union had valid authorization cards from a majority of employees at the time of the election.[2]

Employees Sharon Hamrysky, Sabrina Frazier, and Crystal Thomas identified their own card but the other cards were put into evidence through the testimony of employees of the Union or union members who had taken leaves of absences from their own jobs to come to the Tidewater area to serve as voluntary union organizers and try to organize Be-Lo's employees. They were, of course, compensated by the Union for this effort but were not full-time union employees.

Thirty-seven union organizers (some union employees and others voluntary union organizers) put into evidence some 534 cards. The work force at Be-Lo's 30 stores hovered at any point in time around 760 or so. Many of the cards submitted into evidence were from employees who were no longer employed by Be-Lo at the time of the election although most were still employed.

The organizers were a group of men and women, some of whom were young and some not so young. Some of the organizers were white and some were black. I found all 37 organizers to be honest and competent individuals. Without exception they impressed me by their demeanor on the stand as individuals exceedingly worthy of belief. Not one of these organizers, I find, ever said to an employee they were soliciting to sign a card that the signing of the union authorization card was for the sole purpose of setting an election or that an individual who signed a card was *just* indicating that he or she wanted an election. In virtually all instances the persons who signed the card were given the opportunity to read the card, were encouraged to do so, and appeared to do so. In those instances where the Union received the card from a ''key worker,'' i.e., an employee in the store who was helping to organize the employees, one of the 37 organizers would verify the signature on the card and ask the employee if he or she understood the card or had any questions.

The authorization cards in this case are single-purpose cards and clearly state the following:

> I hereby authorize United Food and Commercial Workers International Union, AFL–CIO, or its chartered Local Union to represent me for purposes of collective bargaining, respecting rates of pay, wages, hours of em-

[2] G.C. Exh. 63 was turned over to the General Counsel pursuant to subpoena as the list of voters and the list which would be used to test the Union's claim of majority support. It was not until several months into the trial before me that Respondent protested that a number of names of persons who signed cards were not eligible to vote because they quit and they should not be used in deciding majority support. I rejected evidence of this as untimely and told counsel we would rely on G.C. Exh. 63 as the critical document.

ployment, or other conditions of employment, in accordance with applicable law.

In this case the cards state clearly and unambiguously on their face that the signer designated the Union as his or her representative. Employees are bound by the clear language of what they sign unless that language is deliberately and clearly cancelled by a union adherent with words calculated to the signer to disregard and forget the language above his signature.

The following organizers, all of whom told the employees they asked to sign cards that the cards were for representation purposes, testified in the order listed and put into evidence the number of authorization cards listed beside their name. If they testified more than once and several did to put cards into evidence the first time they testified is duly noted but the *total* number of cards put in through their testimony is noted by their name. Without exception they possessed a remarkable recollection of the employees who signed cards.

1. Ralph Ramiriz (9)
2. Karen Gompers (16)
3. Frederick Carter (23)
4. Jean Anderson (8)
5. Dorman Watts (3)
6. John Davis (2)
7. Dudley Saunders (18)
8. Berry Morrisette (10)
9. Danny Murray (63)
10. Cynthia Allgood (15)
11. Bernie Hopkins (2)
12. Donna Crumpley (5)
13. Charles Garber (17)
14. Juanita Fridley (20)
15. Patrick Burgwin (5)
16. Donald Cook (2)
17. Russell Wise (15)
18. Jim Green (36)
19. Jeanne Swartz (19)
20. Donna McNutt (11)
21. Steven Henry (16)
22. Tom Rogers (49)
23. Glenda Marshall (1)
24. Vera Harrison (22)
25. Jim Jarboe (17)
26. Mark Federici (4)
27. Max McGhee (10)
28. Denise Perry (29)
29. Robert Stewart (6)
30. Jim Housewright (2)
31. Paul Evans (10)
32. Chad Yound (11)
33. Willie Snow (9)
34. Terry Dixon (1)
35. Michael Boyle (2)
36. Lynn Colbert (38)
37. Michael Heflin (9)

Some 40 witnesses testified in Respondent's case that the union organizer who gave them the authorization card to sign told them, in so many words, that the *sole* purpose of signing the card was to get an election. Some of these witnesses, almost all of whom still worked for Respondent, when they testified before me claimed that the union organizer who solicited their card even told them to ignore the clear language on the card and assured them that the card was to be used *only* to get an election the clear language of the card notwithstanding.

Not only don't I believe these witnesses whose names are noted below in a footnote but I'm convinced that the fact that these otherwise intelligent, decent people would have come into a courtroom and testify as they did is evidence that the unfair labor practices of Be-Lo have not been dissipated by passage of time and that a fair rerun election is not possible in this case.[3] Many of these employees, I conclude, were so terrified about their job security and staying on Be-Lo's good side that they were ready, willing, and able to help Be-Lo's case by saying that union organizers said things to them in soliciting them to sign authorization cards that were not said. Others were merely mistaken when they claim what the person soliciting the card said to them. A number of them claimed all they remembered being said was that an election could be held if enough employees signed a card and that they didn't read the card.

In addition, the General Counsel submitted into evidence some 17 authorization cards where it did not have a witness to authenticate the card and 17 W-4 forms from Respondent's files so that a comparison could be made to see if these were authentic authorization cards or not.

Clearly the card of Elizabeth Patterson should be excluded on the grounds that her name is spelled differently on the authorization card and the W-4, the handwriting is visibly and obviously different, and Elizabeth Patterson credibly testified for Respondent that she did not sign the authorization card.

I will count the cards of Gloria Norman, Peggy Reed, and Donna Du Pertuis even though they claim not to have read the card because it was not clear from their testimony that the person soliciting the card advised them that the sole purpose of signing the card was to get an election. All three women are still employed by Be-Lo.

The remaining 13 cards will be counted because a comparison of the signatures on the authorization cards and the signatures on the W-4 clearly appear to have been made by the same person.

Based on the foregoing it is clear that the Union enjoyed majority support among the employees eligible to vote in the March 21, 1991 election. In deciding that the cards accurately reflect that the signers were designating the Union as their exclusive bargaining representative, I relied on *Gissel Packing Co*., supra; *Cumberland Shoe Corp*., 144 NLRB 1268 (1963), enfd. 351 F.2d 917 (6th Cir. 1965), and specifically approved in *Gissel Packing Co*., supra, and I also relied

[3] In so far as there are inconsistencies, I credit some witnesses over others: I credit Organizer Karen Gompers over Lucille Thornburg and Linda Urguelles; I credit Organizer Fred Carter over Julie Price and Debbie White; I credit Organizer Dudley Saunders over Joyce Riddick and Roy Ray; I credit Organizer Berry Morrisette over William McCain; I credit Organizer Danny Murray over Lola Ford, Allen Butcher, Katherine Schuman, and Adelle Williams; I credit Organizer Cynthia Allgood over Dorethea Holley and Venus McAllister; I credit Organizer Charles Garber over Jamie Turner; I credit Organizer Juanita Fridley over Richard Davis, Deborah Ann Moser, and Will March Jr.; I credit Organizer Patrick Burgwin over Pamela Lejeune; I credit Organizer Russell Wise over Michael Gray, Ronald Taylor, and Harry Fitzpatrick; I credit Organizer Jim Green over Barbara Riddick, Mary Johnson, Shirley Nease, Barbara Wilson, Larry Parker, Crystal Frazier, and Frank Davis; I credit Organizer Donna McNutt over Terry Huffstetler, John Mehan, Sandra Carvey, William McConnell, and Frank Davis; I credit Organizer Steven Henry over Aurelia Watts, Cordelia Beasley, and Julie Borman; I credit Organizer Tom Rogers over Evelyn Chappell, Hatti Edwards; Shelia Morgan, Pauline Pawhit, Frank Flora, Gloria Love, Theresa Robles, and Charlene Augson; I credit Organizer Vera Harrison over Shirletta Pope, Shirley Luter, and Jessica Goode; I credit Organizer Jim Jarboe over Janet Spence; I credit Organizer Mark Frederici over Catherin Lattuga; I credit Organizer Paul Evans over Vickie Brown; I credit Organizer Chad Yound over Harry Parker; I credit Organizer Willie Snow over Grace Calloway; I credit Organizer Lynn Colbert over Vickie Shatzoff, Rowmesa Hoyen, Chris Thomas, and Vanessa Devlin; and I credit Organizer Michael Heflin over Yvonne Giles.

on the recent Board decision in *DTR Industries*, 311 NLRB 833 (1993).

From an analysis of all the authorization cards in evidence and an examination of General Counsel's Exhibit 63 (the voter eligibility list) I find that the following employees signed authorization cards at the following stores:

1. Store 28 (18 out of 46)

Shawn M. Alexander
Mary B. Branch
Troy E. Buzbee
Guy R. Denardo
Hattie Edwards
Sherry A. Foreman
Locricia A. Frias
Sandra Hawkins
Yennetta Jackson
Gloria C. Love
Samatha Mitchille
Sheila M. Morgan
Michael J. Praznik
Theresa Robles
Redonna J. Smith
Paul V. Speller
Martin A. Taylor
Davetta R. Woodhouse

2. Store 37 (37 out of 47)

Jason R. Adkins
Charlene D. Auguson
Deborah M. Bolt
Bernadine L. Boone
Shelly A. Branch
Zelma J. Brinson
Aceton Burke
Tallie P. Byrd
Lester Lee Canty
Evelyn V. Chappell
Kim R. Dantzler
William Dowe
Paula R. Dozier
Arcel Dullas
Kelly R. George
Bobette F. Gray
Charles H. Gwin
Carmen J. Hill
Terri R. Huffstickler
Pamela M. Johnson
Evelyn Keyes
Jeannie Kline
Charles H. Lee, Jr.
Dawn R. Moseley
Pauline Pawlik
Karl W. Peak
Dannee L. Riddick
Michael Salazar
John C. Schmidt
Ellamae M. Smith
Lisa D. Spurs
Kimberly D. Tatum
Emily L. Valdez
Alnita L. Vines
Stefanie Waters
Carolyn R. Whitaker
Leon T. White

3. Store 44 (4 out of 17)

Christ R. Apelt
Jennifer L. Comfort
Shannon M. Deaderick
Kenneth S. Strange

4. Store 47 (9 out of 43)

Christopher A. Banwarth
Jeannette M. Grossmann
Louise Harris
Georgia M. Sampson
Lucille J. Thornburg
Anthony Vogl
Vivian L. Watson
Aurelia Watts
Eugene Wilson

5. Store 59 (16 out of 19)

Donna D. Bolden
Wilhelmina Bray
Vanessa E. Devlin
Tammy L. Diggs
Priscilla L. Elliot
Clementine Hockaday
Rowmesa I. Hoyen
Cecelia C. Mason
Sylvaia McMillian
Michael A. Mercer
Vonda V. Satchell
Meryle H. Simpson
Rene W. Smithwick
Jeffrey G. Staton
Michael Staton
Mary E. Washington

6. Store 60 (8 out of 20)

Michael G. Brady
Edwin R. Crocker
Judy Johnson
William J. McConnell
Amada L. Phillips
Jannet E. Spence
Paul M. Stopyra
Paul J. Taylor

7. Store 62 (10 of out of 16)

Domonique Bailey
Derrick M. Daughtry
Lisa M. Drake
Will L. March, Jr.
Deborah L. Morris
Angela C. Reagle
Patricia C. Toledo
Ernestine J. Turner
Santana M. Wilson
Eleanor Lunison

8. Store 63 (7 out of 12)

Annette M. Augson
Ruby Y. Hassell
Alfred Mellon
Dorothy M. Pugh
Shirley B. Thomas
William G. Thornton
Lucille Turner

9. Store 67 (18 out of 56)

Debra D. Banks
Paul J. Blancato
Jerry L. Clements
Carolyn J. Cooper
Joseph R. Davis, Jr.
Wanda L. Deering
Honorleah M. Dixon
Donna E. Du Pertuis
Frank H. Flora
Michael G. Gibson
Samuel Jackson
Myrna J. Neff
Rebecca J. Nichter
Harry K. Parker
Fred L. Roberts
Vickie M. Shatzoff
Jesse J. Stevens, Jr.
Chris A. Thoms

10. Store 73 (10 out of 23)

Veronica Gordon
Frederick J. Griffin
Mary Gwaltney
Diane F. Holland
Markeita Murphy
Cecilio C. Velez
Sharon L. Watson
Regina L. Winslow
Debra A. Zachary
Yolanda Lewis

11. Store 84 (8 out of 13)

Olivia J. Copeland
Bob B. Fleming
Nancy D. Gitt
Thomas B. Skipwith
Sidney A. Weiss
Chester R. Williams
Liesa L. Woods
Jessie Shaw

12. Store 96 (6 out of 14)

Teresa L. Hall
Lorianne N. Hopkinson
Catherine L. Lattuca
Lisa C. Phillips
Howard G. Wade, Jr.
Regina M. Williams

13. Store 102 (6 out of 6)

Ronnette P. Robinson
Charlene M. Sharp
Erlinda D. Urguelles
Shirlene R. Walker
Jamie J. Wischmann
Gary A. Wright

14. Store 107 (12 out of 20)

Brian K. Arrington
Malcolm Q. Edmond
Jeffrey F. Pope
Varsorine E. Ralph

Jennifer L. Freeman
Karen K. Gilchrist
Lelia A. Harrell
Elton Norman
Barbara D. Riddick
Joyce A. Riddick
Melva V. Watford
Keith Lewther

15. Store 109 (2 out of 29)

Dianne Barhydt
Barbara Evans

16. Store 110 (11 out of 14)

Amy M. Berkstresser
Barbara J. Brockett
Sandra Carney
Frank B. Davis
Linda B. Dugan
Gairett D. Lamkin
John R. Mehan
Dorothy R. Merritt
Rose M. Shrieves
Christopher Shugrue
Shirley J. Terry

17. Store 111 (28 out of 39)

Annie T. Adams
Sherry Allen
Earnest Barrrett, Jr.
Vanessa Cooper
Bervin Cuffee
Maurico B. Damag
Milton L. Elliot, Sr.
Anthony N. Everett
David L. Goodman
Betty Sue Harris
Eric A. Jones
Sherrie M. Kroner
Gwanda C. Majette
James McCracken, Jr.
Godwin Mitchelle
Sylvia R. Munford
Linda I. Neville
Raymond A. Ricks
Christopher L. Riddick
Janice E. Robinson
Linwood Selby
Patricia R. Skinner
Danie C. Taylor
Linda V. Thorogood
Russell Williams
Valerie D. Williams
Leander J. Wilson
Mary R. Winstead

18. Store 120 (0 out of 14)

19. Store 121 (17 out of 30)

Paul O. Bass
Marian E. Byrum
Robert E. Carpenter
Crystal M. Frazier
Euvonka M. Joyner
Gary R. Kluesener
Michael Massenburg
Venus O. McAllister
Shirley A. Nease
Lloyd W. Norman, Jr.
Julie A. Price
Rhona L. Roberts
Anthony B. Saunders
Russell Stokes
Carol J. White
Barbara A. Wilson
Roy Ray

20. Store 122 (26 out of 36)

Christine D. Amos
Demond Boons
Tirrell R. Brown
Richard H. Buhls
Traci L. Cheeks
Rebecca G. Evans
Yvonne A. Giles
Katina Hall
Michelle Hillard
Colleen C. Hitt
Dorothea L. Holley
Mary E. Johnson
Leon Jones
Paula E. Jordan
Mary N. Kindred
Mary A. Lewis
Brenda L. Maryland
Gloria D. Norman
Melinda M. Parker
Peggy Ann Reed
Olif T. Richardson
Mandy S. Sheperd
Sharon L. Tyler
Ronnie L. White
Evelyn J. Wiggins
Debra L. Williams

21. Store 126 (15 out of 20)

Twana M. Bethea
Lavonne M. Billups
Tommy G. Coffer
Angela T. Cox
Issac Dozier
Sandra S. Elliott
Annie M. Ferguson
Kenneth Fowlkes
Vondris D. Gailing
Kim Howell
Felicia A. Jones
George W. Martin
Chrystal A. Red-Fox
Emma E. Thompson
Rosalie B. Usher

22. Store 144 (9 out of 17)

Dennis E. Carney
Karen Ann Harkleroad
Delaney B. Middleton
Toni R. Rugley
Sarah B. Sloan
De Hoyos J. Smith
Sterling B. Stubbs
Della F. Welch
Bertha N. Williams

23. Store 145 (14 out of 25)

Bessie A. Baptiste
Velma E. Certain
Jessica C. Goode
Freda L. Joyner
Shirley A. Luter
Beatrice A. Maurer
Shirletta A. Pope
Tracy Powell
Chancey O. Prince
Sylvania R. Prunty
Kelly D. Riddick
Donna Saunders
Mariama M. Sonko
Vernon Ward

24. Store 148 (14 out of 21)

Lawrence Boone, Jr.
Kelly A. Call
Angela L. Diggs
Susan Bacani Finley
Harry Fitzpatrick
Sharon L. Gordone
Michael K. Gray
Michael N. Hollie
Pamela L. Lejeone
Maela R. Lindsay
Shanda M. Norfleet
Ronald W. Taylor
Chester Wright
Rita Gaines

25. Store 185 (7 out of 19)

Julie A. Borrman
Loretta H. Bullard
Lisa M. Grayson
Wayne K. Kirk
Albert H. Mittchell, III
Frank D. Mortiz, II
Erwin R. Sabile

26. Store 232 (17 out of 27)

Gwenevere R. Andrews
Dianne T. Bass
Joyce R. Bell
Nekicia M. Copling
Shelli Cosby
Cynthia Ferguson
Jeannette D. Gilchrist
Catherlee Hill
Kevin A. Jackson
James K. Moody
Sheryl D. Rivers
Alma Sanuels
Anthony M. Smith
Allyson N. Stokes
David W. Wallace
Adele C. Williams
Allen Butcher

27. Store 233 (5 out of 13)

Robert D. Clark, II
Doreatha G. Golden
William A. McCain
Adriel R. Newby
John W. Tardy, IV

28. Store 234 (37 out of 48)

Wesley L. Agee
Mary A. Barfield
Alease R. McGlone
Trinette D. Medley

| | |
|---|---|
| Ruthie Mae Batts | Bobby E. Moore, Jr. |
| Deborah A. Bracey | Fonville Morris, Jr. |
| Angelia D. Bretz | Shelia Ann Musick |
| Shawn D. Carrier | David D. Nettles |
| Robert C. Crawford | Melissia I. Pennie |
| Ezell G. Davis | Andrea M. Porter |
| Richard E. Davis | Arnold L. Purdie |
| Yvonne Fletcher | Hansford D. Raper |
| Georgia D. Groshong | John W. Reeder |
| Erwin H. Hatchett | Sylvia J. Roberts |
| Annette M. Hayslett | James L. Salisbury |
| Pamela L. Jackson | Katherine L. Schuman |
| Issac J. Johnson | Susan Walker |
| Erica D. Jones | Robin D. Williams |
| Anita M. Little | Charlie M. Wilson |
| Michelle L. Martin | Geraldine Wise |
| Faythe R. Mayo | |

29. Store 235 (12 out of 18)

| | |
|---|---|
| Diana L. Branstetter | Theresa D. Huff |
| Shella C. Buffa | Kristena M. Komorny |
| Gregory C. Carter | Myra J. Lee |
| Catrice M. Coles | Rosie P. Phares |
| Sabrina A. Frazier | Tamica Smith |
| Alvin L. Hewett | Steve Ridgill, Jr. |

30. Store 236 (20 out of 34)

| | |
|---|---|
| Gregory L. Boyd | Curtis Martin |
| Vickie V. Brown | Janice A. Miller |
| William A. Brown | Joan D. Porter |
| Darlina M. Bynum | Robert Porter |
| Grace M. Calloway | Gwendolyn M. Pugh |
| Christina Cooper | Irene A. Ruffin |
| Lola Ford | Danae M. Solomon |
| Dwane T. Gaskins | Yale K. Tapp |
| Sarah C. Johnson | Jamie D. Turner |
| Robet T. Jones | Paul Paitzel |

Accordingly, I find that the Union enjoyed majority support among the 756 eligible voters because it had valid authorization cards from 403 unit employees. In other words 53.3 percent of the unit employees supported the Union. I did not permit counsel for Be-Lo to put in evidence of employee turnover subsequent to the election into the record because I found it irrelevant in deciding the appropriateness of a *Gissel* bargaining order. I relied on *Q-1 Motor Express*, 308 NLRB 1267 (1992).

I further find that because of the numerous and serious unfair labor practices committed by Respondent during the period leading up to the election and after the election that a fair rerun election is not possible because of the nature and extent of these unfair labor practices. I consider in reaching this conclusion that a fair rerun election is not possible the demeanor of supervisor and Meat Manager Gregory Wright on the stand and the fact that he was terrorized to testify against what he believed to be Be-Lo's interests, the fact that no less 40 employees were willing to say pretty much whatever Be-Lo wanted them to say to invalidate the union authorization cards they signed, because of the testimony of Deborah Moser who lied on the stand in order to curry favor from Be-Lo. The effects of Respondent's unfair labor practices are far from dissipated.

While a number of supervisors and agents of Be-Lo who committed unfair labor practices are no longer with Be-Lo, i.e., President Rex Corwin, John Ames, L J Davis, all of whom retired and Brian Weatherly, Terry Hill, Dick Powers, Curtis Whidbee, Tom Flannery, and Chris Bush, all of whom have moved on to other jobs a large number of supervisors who committed unfair labor practices remain with Be-Lo, to include, Manual Saunders, David Bromley, James Harrell, Jeff Riley, Cheryl Perras, Morris Schwartz, Bert Harrell, Robert Harrell Sr., Robert Harrell Jr., Paul Weithers, Milton Parker, Tommy Tisdale, John Bullock, David G. Griffey, Mike Mainello, Lewis Moon, Nancy Sells, Jack Scott, Scarborough White, Tommy Winfrey, Gregory Wright, Robert Nies, Paul McFarland, Howard Wright, Rick Kyle, Robert Weirick, Bob Evans, and Delli Suitor.

Whether this case is categorized as a category 1 or a category 2 case under *Gissel*, supra, it is clear to me, that the Union enjoyed majority support, the unfair labor practices committed by Be-Lo were ''hallmark'' violations, the effect of these unfair labor practices rendering a fair rerun election impossible, and the interests of justice cry out for the issuance of a bargaining order.

Since the Union enjoyed majority support Be-Lo violated Section 8(a)(5) when it refused since March 20, 1991, to recognize and bargain with the Union.

## THE REMEDY

In light of the numerous unfair labor practices spelled out in parts II, III, and IV of this decision and considering the contents of Part IV, the remedy in this case should include the posting of a notice, a cease-and-desist order, reinstatement and backpay for discriminatees, a *Gissel* bargaining order, and an order to make the Union whole for legal and other expenses it incurred in connection with the unlawful maintenance by Be-Lo of the injunctions against the Union between September and December 1991.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1), (3), and (5) of the Act as more fully spelled out in parts II, III, and IV of this decision.

4. Since March 20, 1991, the Union has been the exclusive bargaining agent, within the meaning of Section 9(a) of the Act, representing a majority of the employees in the unit.

5. The unfair labor practices committed by Respondent effect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]